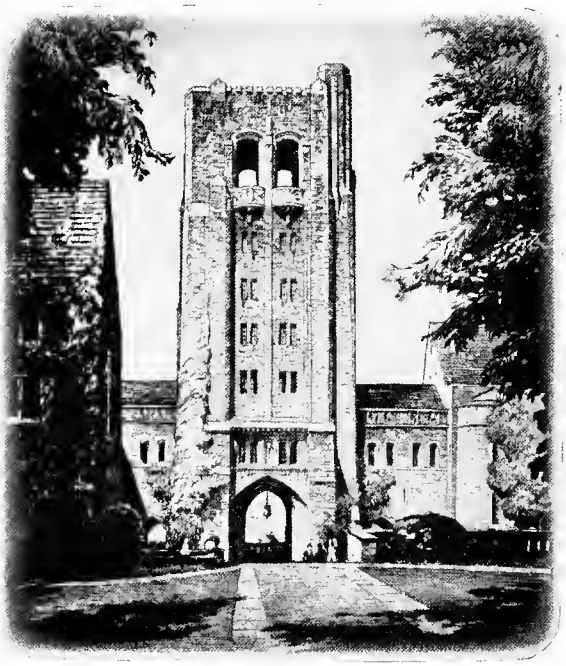

# PATTEE'S ILLUSTRATIVE CASES IN EQUITY

(SECOND EDITION.)

# ILLUSTRATIVE

# CASES IN EQUITY

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SELECTED BY

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DEAN OF THE COLLEGE OF LAW OF THE UNIVERSITY OF MINNESOTA.

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SECOND EDITION

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# PREFACE.

THESE cases have been collected for use in the class room. They are not selected as "leading," but rather as "illustrative," cases in that part of Equity Jurisprudence which deals with the "first principles" and the "doctrines" of Equity. They are not designed to be used alone, but in connection with my lectures upon those topics, as aids to the student in his work; and their chief value is to be found in the emphasis which they give to those principles and doctrines by furnishing a particular case illustrative of each, and by directing the student to numerous authors and Reports where each particular topic is elaborately discussed or specifically applied.

I have not been anxious to select those cases only wherein the decision has turned upon the principle under consideration, but I have to some extent selected those which illustrate the use that courts make of equitable principles in their arguments regarding equitable interests and estates, even though the ultimate decision may have turned upon some other point.

WM. S. PATTEE, LL.D.

COLLEGE OF LAW OF THE UNIVERSITY OF MINNESOTA,
MINNEAPOLIS, December 1, 1893.

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# ILLUSTRATIVE CASES IN EQUITY

## PART I.

## JURISDICTION.

### An equity court has no criminal jurisdiction, but is limited to the protection of civil rights.

(99 Ill. 489.)

COPE v. DISTRICT FAIR ASS'N OF FLORA.

(*Supreme Court of Illinois.* June 21, 1881.)

Equity does not enforce the criminal law of the state.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The question presented for our determination by the record in this case is, will an injunction lie at the suit of a stockholder in an incorporated fair association, restraining the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company, during its annual exhibitions, where it does not appear, from the bill or otherwise, that the complainant or the company has thereby sustained some pecuniary injury or loss.

The circuit court of Clay county and the Appellate Court for the Fourth District have both answered this question in the negative, and, we think, properly.

It is no part of the mission of equity to administer the criminal law of the State or to enforce the principles of religion and morality, except so far as it may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance. High on Inj. sec. 23.

The licensing of gambling tables by the officers of the company can not, in any sense, be regarded the act of the company. It is foreign to the objects and purposes of the association, and is clearly *ultra vires*, and the officers alone are responsible unless authorized by the stockholders, in which case it would doubtless be such an abuse of the company's franchises as would warrant the State in reclaiming them. Gambling—such as that complained of—is a violation of the criminal code, which affords ample means for its suppression.

If the bill in this case showed any pecuniary loss or injury, it would present an entirely different question; but nothing of that kind is claimed or pretended, and we are aware of no principle upon which such a bill can be maintained, and counsel has failed to suggest any or furnish us with any precedent where such a bill has been sustained.

The judgment of the Appellate Court is affirmed. *Judgment affirmed.*

(104 Mass. 239.)

ATTORNEY GENERAL v. TUDOR ICE CO.

(*Supreme Judicial Court of Massachusetts.* 1870.)

Equity does not administer punishment for transgression of law, but its jurisdiction is limited to the protection of civil rights.

GRAY, J. This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the Commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation; and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason." No case is therefore made, upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In *Attorney General* v. *Utica Insurance*

*Co.* 2 Johns. Ch. 371 Chancellor Kent, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by information in the nature of a *quo warranto;* and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon filed, and sustained by the supreme court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People* v. *Utica Insurance Co.* 15 Johns. 358. Similar proceedings may be had at law in this Commonwealth in a proper case. *Goddard* v. *Smithett*, 3 Gray, 116, 122, 123. *Attorney General* v. *Salem*, 103 Mass. 138. *Boston & Providence Railroad Co.* v. *Midland Railroad Co.* 1 Gray, 340. Gen. Sts. c. 145, §§ 16–24.

One early English case of high authority, not cited by Chancellor Kent, nor at the argument of the present case, is so much in point as to be worth quoting in full. Upon a bill in equity, filed by the attorney general, at the relation of several freemen of the Weavers' Company, against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, &c., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, &c., was the end of the bill. To which the defendants demurred, because as to part of the bill, it was to subject them to prosecutions at law, and to a *quo warranto;* and as to the other parts, the plaintiffs had remedy by *mandamus*, information, or otherwise, and not here. And of the same opinion," the report proceeds, was Lord Cowper, "who said it would usurp too much on the king's bench; and that he never heard of any precedent for such a case as this; and so allowed the demurrer." *Attorney General* v. *Reynolds*, 1 Eq. Cas. Ab. (3d ed.) 131.

The modern English cases, cited in support of this information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation and held by municipal corporations or officers upon specific public trusts. Such were *Attorney General* v. *Norwich*, 16 Sim. 225, *Attorney General* v. *Guardians of Poor of Southampton*, 17 Sim. 6, and *Attorney General* v. *Andrews*, 2 Macn. & Gord. 225.

The hypothetical case, in which Lord Westbury, in *Stockport District Waterworks* v. *Manchester*, 9 Jur. (N. S.) 266, said that he should "probably not hesitate" to act upon the information of the attorney general, was of a suit to restrain the making of a contract between an aqueduct corporation and a city to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from *Liverpool* v. *Chorley Water Works Co.* 2 De Gex, Macn. & Gord. 852, 860, and *Ware* v. *Regent's Canal Co.* 3 De Gex & Jones, 212, 228, were but *dicta* that an unauthorized diversion of water or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the attorney general.

The case of *Attorney General* v. *Great Northern Railway Co.* 4 De Gex & Smale, 75, was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of *Attorney General* v. *Oxford, Worcester & Wolverhampton Railway Co.* 2 Weekly Rep. 330, was the case of the opening of a railway line in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public.

The single case, in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers, is *Attorney General* v. *Great Northern Railway Co.* 1 Drewry & Smale, 154, in which Vice Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice Chancellor Wood, two years later, in *Hare* v. *London & Northwestern Railway Co.* 2 Johns. & Hem. 80, 111.

In *Attorney General* v. *Mid Kent Railway Co.* L. R. 3 Ch. App. 100, a mandatory injunction was granted upon the information of the attorney general to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection that the attorney general might have had an equal and complete remedy at law was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said, in the English books, that the king or his attorney general, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Pract. (3d Am. ed.) 6, 7. *Attorney General* v. *Galway*, 1 Molloy, 95, 103. However that may be, by our statutes the general equity jurisdiction of this court is limited to

cases where there is no plain, adequate and complete remedy at law, as well in suits by the Commonwealth as in those brought by private persons. Gen. Sts. c. 113, § 2. *Commonwealth* v. *Smith*, 10 Allen, 448. *Clouston* v. *Shearer*, 99 Mass. 209, 211, and other cases there cited. The 38th of the former rules in chancery of this court (14 Gray, 360) by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the Constitution and laws of the Commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established. Rules of 1870, *post*, 555.

The only cases in which informations in equity in the name of the attorney general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. *District Attorney* v. *Lynn & Boston Railroad Co.* 16 Gray, 242. *Attorney General* v. *Cambridge*, Ib. 247. *Attorney General* v. *Boston Wharf Co.* 12 Gray, 553. *Rowe* v. *Granite Bridge Co.* 21 Pick. 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. *Parker* v. *May*, 5 Cush. 336. *Jackson* v. *Phillips*, 14 Allen, 539, 579. *Attorney General* v. *Garrison*, 101 Mass. 223. Gen. Sts. c. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them.

*Information dismissed.*

(See, also, 1 Story, Eq. Jur. § 25, note; Pom. Eq. Jur. §§ 36, 197, 202, 402, 936, 940, note 2, 1347, note, 1361, note; Phillips v. Stone Mountain, 61 Ga. 386; Association v. Boogher, 3 Mo. App. 173; Davis v. Society, 75 N. Y. 362.)

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PART II.

# THE FIRST PRINCIPLES OF EQUITY, GENERALLY CALLED "MAXIMS."

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## Maxim 1. He who comes into equity must come with clean hands.

(66 Pa. St. 187.)

BLEAKLEY'S APPEAL.

(*Supreme Court of Pennsylvania.* 1870.)

Where one attempts to perpetrate a fraud upon another in a particular transaction, equity will not assist him to maintain any rights which he may claim in the premises, on the ground that he who comes into equity must come with clean hands.

The opinion of the court was delivered, October 27th 1870, by

AGNEW, J.—The facts of this case are few. Robert Lamberton was the owner of a judgment for $31,000, entered against Samuel P. Irvin on the 8th day of June 1865. Irvin had purchased of F. D. Kinnear, Esq., lot No. 449 in Franklin at $2600, of which $820 only remained unpaid, and would fall due on the 6th of August 1865, with a provision for forfeiture of the contract in case of non-payment for thirty days after it fell due. On the 19th of July 1865, Irvin assigned his contract to James Bleakley, binding him to pay the $820 to save the forfeiture, and with the admitted understanding that Irvin should refund the $820 to Bleakley, settle his indebtedness to the bank, of which Bleakley was cashier, and that then Bleakley should reconvey to Irvin's wife. But the assignment was antedated to the 1st of May 1865, thus overreaching Lamberton's judgment. The master finds that this was done to defraud the plaintiff. The finding is ably vindicated in the opinion of Judge Trunkey. The absolute character of the paper, though but a security, the agreement to reconvey to Irvin's wife instead of himself, and the attempt of Bleakley to use the paper to defeat the sheriff's sale of the property by Lamberton on his judgment, evince the true motive for antedating the paper.

Bleakley paid the $820 to Kinnear, and now claims a decree for this sum, before specific performance shall be decreed to Lamberton, who purchased Irvin's title at the sheriff's sale. Kinnear does not resist specific performance, but stands ready to convey to Lamberton, whenever the covinous assignment to Bleakley is put out of his way. It is Bleakley who resists the decree until he is refunded the $820, paid upon the footing of the fraudulent agreement with Irvin, to de-

feat Lamberton's judgment. Bleakley is made a party to the bill only for the purpose of putting aside the covinous assignment to enable Kinnear to convey to Lamberton. The question then is whether a chancellor would require Lamberton to refund the $820 to Bleakley, as a condition to setting aside the assignment and entitling Lamberton to specific performance of Kinnear.

But clearly Bleakley cannot demand repayment of Lamberton either at law or equity. And first he is not entitled to subrogation to Kinnear's rights. Subrogation is not a matter of contract but of pure equity and benevolence: Kyner *v.* Kyner, 6 Watts 221; Wallace's Appeal, 5 Barr, 103. On what pretence, *in foro conscientiæ*, can a party attempting to carry out a scheme of fraud against another, by a payment, claim compensation of the party he has attempted to defraud? Conscience and benevolence revolt at such an iniquity. Again Bleakley did not recognise Kinnear's title by the payment. He did not profess to bargain for it, and Kinnear did not profess to sell it to him. His act was simply a *payment* and no more, made by him because of Irvin's duty to pay, and accepted by Kinnear because of his right to receive from Irvin. Besides the payment was accepted by Kinnear in ignorance of the attempted fraud. There can be no legal intendment therefore of a bargain on Kinnear's part to vest his right to receive the money in Bleakley. As to Lamberton the payment by Bleakley was not only fraudulent and intended to displace his judgment, but it was also voluntary. It was not paid at Lamberton's request nor for his use and benefit; but on the contrary was intended to defeat his right, as a creditor by overlapping his judgment, by means of the covinous transfer. Bleakley is therefore neither a purchaser, nor a creditor of Lamberton, nor an object of benevolence, but is forced upon the record to compel him to put out of the way the fraudulent barrier to Kinnear's specific performance to Lamberton. He cannot, thus standing before a chancellor, ask him to make repayment to him a condition to a decree to remove the fraudulent obstruction he threw in the way. The payment is one of the very steps he took to consummate the fraud upon Lamberton. If he have a legal right of recovery he must resort to his action at law, and if he can have none, it is a test of his want of equity. And in addition to all this, it is a rule that a chancellor will not assist a party to obtain any benefit arising from a fraud. He must come into a court of equity with clean hands. It would be a singular exercise of equity, which would assist a party, who had paid money to enable him to perpetrate a fraud, to recover his money, just when the chancellor was engaged in thrusting out of the way of his doing equity to the injured party, the very instrument of the fraud. Who does iniquity shall not have equity: Hershey *v.* Weiting, 14 Wright 244–5.

We are therefore of opinion the court committed no error in refusing compensation, and the decree of the court below is confirmed.

(See, also, 1 Pom. Eq. Jur. § 397; Wheeler v. Sage, 1 Wall. 518; Creath v. Sims, 5 How. 192; Bolt v. Rogers, 8 Paige, 156; Johns v. Norris, 22 N. J. Eq. 102; Society v. Ordway, 38 Cal. 679; Lewis' Appeal, 67 Pa. St. 166; Wilson v. Bird, 28 N. J. Eq. 352; Atwood v. Fisk, 101 Mass. 363; Overton v. Banister, 3 Hare, 503; Savage v. Foster, 9 Mod. 35.)

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## Maxim 2. Equity aids the vigilant, and not those who sleep upon their rights.

(1 Johns. Ch. 46.)

ELLISON v. MOFFATT.

(*Court of Chancery of New York.* 1814.)

Where a person allows an account to stand 26 years before filing his bill for an adjustment, the bill will be dismissed on the ground of the staleness of the demand.

THE CHANCELLOR. The parties lived in the same county, and, without accounting for the delay, the plaintiff suffered a period of 26 years to elapse, from the termination of the *American* war, to the time of filing his bill. The offer made by the executors being for peace, and without any recognition of the justness of the demand, and being rejected by the plaintiff, cannot affect the question.

It would not be sound discretion to overhaul accounts, in favor of a party who has slept on his rights for such a length of time; especially, against the representatives of the other party, who have no knowledge of the original transactions. It is against the principles of public policy, to require an account, after the plaintiff has been guilty of so great *laches*.

The bill must be dismissed on the ground of the staleness of the demand; but without costs.

(See, also, 1 Pom. Eq. Jur. §§ 418, 419; Story, Eq. Jur. § 64*a*; Snell, Eq. 43; Philips v. Prevost, 4 Johns. Ch. 205; Lacon v. Briggs, 3 Atk. 105; Germantown, etc., Co. v. Fitler, 60 Pa. St. 124–133; Preston v. Preston, 95 U. S. 200; Neely's Appeal, 85 Pa. St. 387; Barnes v. Taylor, 27 N. J. Eq. 259; King v. Wilder, 75 Ill. 275; Johnson v. Diversey, 82 Ill. 446; Borland v. Thornton, 12 Cal. 440; Tash v. Adams, 10 Cush. 252; Peabody v. Flint, 6 Allen, 52; Great Western Ry. Co. v. Oxford, etc., Ry., 3 De Gex, M. & G. 341; McDermid v. McGregor, 21 Minn. 111; Hughes v. Edwards, 9 Wheat. 489; Elmendorf v. Taylor, 10 Wheat. 168; Murray v. Coster, 20 Johns. 576–582; Prevost v. Gratz, 6 Wheat. 481; Story, Eq. Jur. § 1519, note.)

## Maxim 3. He who seeks the aid of equity must do equity.

(46 N. Y. 615.)

COMSTOCK v. JOHNSON.

(*Court of Appeals of New York.* 1871.)

1. Where one grants a privilege to another to draw off water from a dam in sufficient quantity to run a certain mill, and the party enjoying the privilege draws off water to run machinery in front of the mill, on land where he had no right to put it, a court of equity will not restrain the party from thus shutting off the water, unless the complainant ceases to use the land in front of the mill for such an unwarranted purpose.

2. He who seeks equity must do equity.

CHURCH, Ch. J. The principal question in this case, involving the construction of the grant of water, was correctly decided in the court below. It is well settled in this State that the terms used in this grant are to be taken as a measure of the quantity of water granted, and not a limitation of the use to the particular machinery specified. (*Wakely* v. *Davidson*, 26 N. Y., 387; *Cromwell* v. *Selden*, 3 id., 253.) It was found by the court that, at the time the defendant shut the water off, he asserted that the plaintiff had forfeited his right to the water, and claimed a right to shut it off. In this he was mistaken. In depriving the plaintiff of the use of the water under an assertion of forfeiture, he rendered himself amenable to the process of the court for the protection of the plaintiff's rights. The judgment enjoining the defendants from depriving the plaintiff of the quantity of water to which he was entitled under his deed, cannot be disturbed. The only serious question in the case relates to the use of the buzz saw in front of the mill. The plaintiff did not, by his deed, acquire the title to the land in front of the mill, because the description is limited to the land upon which the mill stands; but he did acquire an easement in such land for the purpose of ingress and egress, and also for the purpose of piling and sawing wood for the use of the mill, as it had been used and enjoyed for forty years. Everything necessary for the full and free enjoyment of the mill passed as an incident, appurtenant to the land conveyed. (2 Kent's Com., 467; *Blaine's Lessee* v. *Chambers*, 1 Serg. & Rawle, 174.) But this would not authorize the plaintiff to erect and use machinery upon this land not necessary to the use of the mill, as it had been used, and would not authorize the use of the buzz saw upon that land. The objection is not that the plaintiff propelled the buzz saw with the water from the dam, as he had the right to use the water for any machinery and in any place which he was entitled to occupy; but he could not occupy the space in front of the mill for that purpose. At the time the water was shut off by the defendants, it was being used only to propel this saw; and it is claimed that the defendants were justified in shutting off the water from that machinery; and for that reason the judgment should be reversed, or, at least, that it should be modified so as to restrain the plaintiff from using his buzz saw on the defendants' premises. As we have seen, the judgment against the defendants is fully warranted by the findings; and the question is, whether any modification should be made against the plaintiff. It is a rule of equity that he who asks equity must do equity. The plaintiff was in fault in using the buzz saw on the defendants' premises. It is said that this was an independent transaction, for which the defendants might have an action; and this was the view of the court below. The rule referred to will be applied when the adverse equity grows out of the very controversy before the court, or of such circumstances as the record shows to be a part of its history, or is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges. (*Tripp* v. *Cook*, 26 Wend., 143; *McDonald* v. *Neilson*, 2 Cow., 190; *Casler* v. *Shipman*, 35 N. Y., 533.)

All the facts connected with the right of the plaintiff to use the buzz saw were not only spread out upon the record, but were in fact litigated upon the trial, and, as to his strict legal rights, are undisputed; and we cannot say that, but for his use of the saw on the defendants' premises, the water would not have been shut off. Whether this was so or not, the controversy in relation to his right to use the saw was involved in the litigation, and was intimately connected with the wrongful act of the defendants; and, being so, it is proper to apply the equitable rule. It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him. The plaintiff, in strictness, was in the wrong in placing his buzz saw in front of the mill. The defendants were in the wrong in shutting off the water, and especially in asserting a forfeiture; and, as both parties are in court to insist upon their strict legal rights, we think substantial justice will be done by modifying the judgment so as to enjoin the plaintiff from using the buzz saw on the land in front of his mill, and, as modified, judgment affirmed, without costs to either party against the other in this court.

All concur.

Judgment accordingly.

(See, also, 1 Pom. Eq. Jur. § 385; Story, Eq. Jur. § 64*e*; Snell, Eq. § 41; Powell v. Thomas, 6 Hare, 300; Fanning v. Dunham, 5 Johns. Ch. 122, 142–144; Williams v. Fitzhugh, 37 N. Y. 444; Bank v. Bell, 14 Ohio St. 200; Kuhner v. Butler, 11 Iowa, 419; Hart v. Goldsmith, 1 Allen, 145; Mumford v. Insurance, etc., Co., 4 N. Y. 463–483; Willard v. Tayloe, 8 Wall. 557; McGoon v. Shirk, 54 Ill. 408; Reed v. Tyler, 56 Ill. 288; McLaughlin v. McLaughlin, 20 N. J. Eq. 190; Campbell v. Campbell, 21 Mich. 438–453.)

(See post, "Election" and "Estoppel.")

## Maxim 4. Equity looks to the intent of the parties rather than to the form of their transactions.

(71 Me. 567.)

STINCHFIELD v. MILLIKEN.

(*Supreme Judicial Court of Maine.* December, 1880.)

PETERS, J. The following facts are deducible from the evidence in this case: The complainant purchased of the defendants, certain steam-mill machinery, for removal from Hallowell to Danforth, in this State. There was at the time a verbal agreement, that the complainant should build a mill, and put the machinery into it, on a lot of land in Danforth, bought by him of one Russell, who was to deed the lot directly to the defendants. The complainant was also to procure a deed of his home (another) lot to the defendants from the heirs of H. E. Prentiss, who held an absolute title thereof as security for the complainant's indebtedness to them, there being a small balance only unpaid, which the defendants were to pay for him. The defendants were to give an agreement, to convey to the complainant if he paid his indebtedness to them according to the tenor of certain notes to be given.

On June 15, 1875, the complainant gave to the defendants a mortgage on the machinery as personal property to secure the notes hereafter named, in order to protect a lien thereon until the machinery should be put into the mill to be built, and become a part of the real estate. And there was embodied in this mortgage, an agreement of the complainant to build the mill and put the machinery into it. On June 16, 1875, Russell conveyed the mill lot to the defendants. On August 2, 1875, Prentiss conveyed the home lot to them, they paying the balance of the Prentiss claim. On August 4, 1875, the defendants gave a writing to the complainant, agreeing to convey the property to him upon the condition that he would pay to them his notes on one, two, three, and five years, respectively, with interest. The notes were given for the amount payable for the machinery, the sum paid to Prentiss, and for other loans and advances. The complainant went on and erected and completed a mill on the Russell lot, and the steam-mill machinery became a part of it.

The complainant seeks to redeem the property, claiming the transaction to be a mortgage. The defendants contend that the transaction was not a mortgage, that it was a conditional sale.

It was not a legal mortgage: Because the defeasance has no seal. *Warren* v. *Lovis*, 53 Maine, 463. And because the papers were not between the same parties. At law, the conveyance must be made by the mortgager and the defeasance by the mortgagee. *Shaw* v. *Erskine*, 43 Maine, 371.

But the transaction was in equity a mortgage—an equitable mortgage. The criterion is the intention of the parties. In equity, this intention may be ascertained from all pertinent facts either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. No matter how much the real transaction may be covered up and disguised. The real intention governs. "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg* v. *Mann*, 2 Sum. 533.

The existence of a debt is well nigh an infallible evidence of the intention. The intention here is transparent. The defendants have a debt and held the property as a security for its collection. A legal mortgage was avoided; an equitable mortgage was made.

Although different at law, in equity a mortgage is not prevented because the conveyance does not come from the equitable mortgager. It is sufficient that the debtor has an interest in the property conveyed, either legal or equitable. Having such an interest, if he procures a conveyance to one who advances money upon it for him, taking the property as security for the money advanced, he has a right to redeem. The grantee in such case, acquiring the title by his act, holds it as his mortgagee. Jones on Mort. 2d ed. § 331. *Stoddard* v. *Whiting*, 46 N. Y. 627; *Carr* v. *Carr*, 52 N. Y. 251.

It is denied that this court has the power to declare that an absolute deed shall be deemed to be a mortgage, allowing an equitable mortgager the right to redeem. At law, it has no such power. Nor, when the court had a limited jurisdiction in equity, was the doctrine admitted. It was always understood, however, that, in a case like the present, if, instead of a demurrer, an answer was filed admitting the facts alleged, the court had the power to apply the remedy. *Thomaston Bank* v. *Stimpson*, 21 Maine, 195; *Whitney* v. *Bachelder*, 32 Maine, 313; *Howe* v. *Russell*, 36 Maine, 115; *Richardson* v. *Woodbury*, 43 Maine, 206. But since the act of 1874 conferred general chancery powers upon the court, it has full and complete jurisdiction in such cases. *Rowell* v. *Jewett*, 69 Maine, 293–303; Jones, Mort. (2d ed.) § 282.

Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions

would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be made by admitting a verbal defeasance to be proved. The cases which support this view are too numerous to cite. The American cases are collected in Jones, Mort. 2d ed. § 241, *et seq.* See *Campbell* v. *Dearborn*, 109 Mass. 130; and *Hassam* v. *Barrett*, 115 Mass. 256.

The complainant seeks to separate the articles originally mortgaged as personal property, and, being allowed the value of them, redeem the balance of the estate only. That would not be equitable. The personal became a part of the real as originally designed to be. It was affixed and solidly bolted thereto. The mortgage was evidently only to serve a temporary purpose. It was not just to either party that there should be two mortgages instead of one. It is urged that the defendants foreclosed the personal mortgage. It could not be done. The personal mortgage was extinguished when attempted to be done. That was but a ruse to get the possession which the defendants were entitled to. No severance was ever made or attempted to be made.

It is intimated that the mill has burned down, *pendente lite*, under an insurance obtained by the defendants, and a question may arise, before the master, whether the complainant should have a credit of the net proceeds. If the insurance was obtained on the mortgagees' own account only, they should not be allowed. *Cushing* v. *Thompson*, 34 Maine, 496; *Pierce* v. *Faunce*, 53 Maine, 351. The head note in *Larrabee* v. *Lumbert*, 32 Maine, 97, is erroneous in that respect. It was allowed in that case by consent. *Insurance Co.* v. *Woodbury*, 45 Maine, 447.

But where a mortgagee insures the property by the authority of the mortgager, and charges him with the expense, then any insurance recovered should be accounted for. And if a mortgager covenants to insure, and fails to do so, the mortgagee can himself insure at the mortgager's expense.

One of the defendants testifies that "Stinchfield agreed to pay all taxes and insurance." He also says, "We have had the house, stable and mill insured, and have paid the insurance, $108." We think this is evidence of an insurance obtained by the mortgagees at the expense of the mortgager on account of his failure to keep his verbal covenant to insure, and renders it proper that the net proceeds of any insurance obtained should be allowed in the settlement between them.

But this cannot be, if the insurance was collected under a policy in which it is agreed between the insured and insurer that the company in case of loss should be subrogated to the right of the mortgagee. For in such case the insurance is not in fact on the mortgager's account, nor is it such an insurance as could be made available to him. Jones, Mort. (2d ed.) § 420, and cases in note.

The complainant may redeem the whole property upon payment of whatever may be due upon the whole debt. Inasmuch as the complainant sets up a claim exceeding the equitable right, neither party to recover costs up to the entry of this order; and whether future costs shall be recovered by either side, to be reserved for decision when the proceedings are to be finally terminated. Another reason why complainant should not recover costs is, that when his bill was commenced the mortgage debt was not due. The mortgage could not be redeemed until 1880. The bill was commenced long before that time. But as the mortgage is now due, and no point is taken that the proceeding was premature, it will probably be for the interest of all the parties that their matters may be adjusted under this bill. For which purpose a master must be appointed, unless the parties can best determine the accounts between themselves.

*Decree accordingly.*

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

(See, also, 1 Pom. Eq. Jur. §§ 162, 163, 378; 3 Pom. Eq. Jur. § 1196, note; Snell, Eq. § 45; Adam, Eq. 111, note; Holton v. Meighen, 15 Minn. 62, Gil. 50; Belote v. Morrison, 8 Minn. 87, Gil. 62; Russell v. Southard, 12 How. 139. Strong and clear proof required, Sloan v. Becker, 34 Minn. 491, 26 N. W. Rep. 730; 68 N. Y. 449; 53 N. J. Eq. 143; 55 Cal. 143; 102 Ill. 441. Once a mortgage, always a mortgage, Wing v. Cooper, 37 Vt. 169; French v. Burns, 35 Conn. 359; 109 Mass. 130.)

(See, further, under subjects, "Mortgages," "Penalties," and "Forfeitures.")

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## Maxim 5. Equity imputes an intention to parties to fulfill their obligations.

(2 Vern. 558.)

WILCOCKS v. WILCOCKS.

(*High Court of Chancery.* 1706.)

Where a party covenants, on his marriage, to purchase lands and settle them upon certain persons, and, after purchasing lands, dies without making the settlement, but the lands descend by law to the said persons, the descent of the lands will be regarded in equity as a satisfaction of the covenant.

(See, also, Deacon v. Smith, 3 Atk. 323; Lechmere v. Earl of Carlisle, 3 P. Wms. 211, 228, note.)

(18 N. J. Eq. 406.)

JOHNSON v. DOUGHERTY.

(*Court of Chancery of New Jersey.* May, 1867.)

Where a guardian purchases land with his ward's money, but takes the title to himself, the court of equity will treat the guardian as a trustee holding the land for his ward,—*i. e.*, the court will impute to the guardian an intent to fulfill his obligation to his ward.

THE CHANCELLOR.

This suit is to foreclose a mortgage, given by Jacob R. Terhune and wife, to Martha Speer, for $700, dated on the ninth day of April, 1853. It includes a lot of land in Bergen county, and two lots in Passaic county; $400 of the principal has been paid, and complainant seeks payment of the remaining $300, with interest. The mortgage was assigned by Martha Speer to Daniel Depew, on the tenth day of May, 1854, and was by him assigned to the complainants, in September, 1860. It is admitted that the mortgage, while held by Depew, was a valid and subsisting encumbrance on the property. Jacob R. Terhune and his wife, on the tenth day of May, 1854, conveyed the mortgaged premises and one other lot, to Letitia Johnson, the wife of the complainant, who died on the fourth day of February, 1859, leaving the defendant, Catharine Jane Dougherty, her daughter, her only issue and her heir-at-law. She was then seventeen years old, and afterwards married the defendant, James Dougherty.

After the purchase from Terhune, Johnson and his wife purchased two other lots, adjoining the first lot in the deed, from Terhune, being together the half acre excepted in that deed; one of these two lots was conveyed to him and his wife, and the other to his wife. On the thirteenth of September, 1860, Johnson, by a written contract, agreed to convey to Abraham Coe, the first tract in the deed from Terhune, and the half acre excepted out of it in that deed and conveyed by the two subsequent deeds. The price was to be $1300, of which $300 was paid in cash; the residue was to be paid on the delivery of the deed, which was to be on or before December, 1864; Coe, in the meantime, to occupy the property and pay $70 yearly rent for it.

With the $300 paid by Coe, Johnson purchased the mortgage held by Depew, and had the same assigned to him so as to have it foreclosed, and by a sale of the property, to give title to Coe; which could not otherwise be done, as the defendant, Catharine Jane, was a minor.

The defendants allege that the property conveyed by Terhune was purchased and paid for by money of the defendant, Catharine Jane, held by her mother, and was expressly bought and intended for her, and that it was, in consequence thereof, held in trust for her, free from any curtesy or interest of Johnson; and that when Johnson sold, or undertook to sell the same to Coe, the purchase money belonged to her, and when he paid Depew for this mortgage $300 received from Coe, the mortgage was satisfied or held in trust for her.

The consideration of the conveyance from Terhune was $1000 or $1025. Of this, $300 was left in the mortgage, which was by payments, on the day of the conveyance, reduced to $300, and transferred to Depew; $700 or $725 was paid in money. It appears satisfactorily, by the weight of the evidence, that Letitia Johnson had in her hands about $700 of money belonging to her daughter, which she desired and intended to invest in this property, for the benefit of her daughter. It is proved, and not disputed, that she recovered and received upwards of $700 in a suit brought by her as next friend, in her daughter's name, in New York, for damages to her real estate in that state; and that she had several hundred dollars of the personal estate of Stephen Christopher, her first husband, and the father of Catharine Jane, to which Catharine Jane was entitled; and it is fair to presume that the money advanced for the expenses of that suit was intended to be advanced out of this money. The amount recovered is clearly proved by the attorney, who prosecuted the suit, and collected the greater part of it. The only evidence on the other side is that of the complainant, who is so clearly shown to be mistaken in the most material parts of his account of what became of this money, as to deprive his testimony of all its weight.

The repeated declarations of his wife, at or about the time of the purchase, that this was bought with the $700 of her daughter, and was intended for her, are already proved, and are in harmony with the attending facts and circumstances.

It is a settled principle, that when one person purchases property for a stranger, and the purchase money is paid by the stranger, or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the land is held in trust for the party whose money paid for it. So, if a guardian or other trustee purchase with the money of his ward or other *cestui que trust*, a trust results by operation of law. This trust arises without any declaration in writing, for it is expressly excepted by the statute of frauds, from the operation of that statute; and the facts necessary to constitute such trust can be proved by parol, even if denied by the answer. *Hill on Trustees*, 91–2, and *notes*, and 95; *Depeyster* v. *Gould*, 2 *Green's C. R.* 480.

In this case, the lands conveyed to Letitia Johnson by Jacob R. Terhune and wife, by their deed of May tenth, 1853, must be taken to have been held by her in trust for her daughter, Catharine Jane, with whose money, and for whose benefit, the same was purchased. But this does not dispose of the main question in this cause. The mortgage was in Depew's hands, a valid security. It was bought by Johnson that he might fore-

close it; not to pay it off. He bought it with money that was his own, and to which the defendants had no claim. The money was paid to him by Coe, as the consideration of his agreement to convey the property. Coe got no title, but only Johnson's personal obligation to give title. Johnson, if he does not convey title, will be personally liable to pay this money back; it is no lien on the property of the defendants. The lot conveyed to Johnson and his wife by Mrs. Terhune and her heirs, for which he paid $324, is included in the sale to Coe; and of this, the fee was vested in Johnson solely, by the death of his wife. Such is the effect of a conveyance to husband and wife jointly.

The complainant is entitled to a decree for the sale of the mortgaged premises. The defendant, Catharine Jane Dougherty, will be entitled to any surplus of the proceeds of such sale, above the mortgage debt and costs.

A decree must be made accordingly.

(Though they do not apply the above principle in so many words, yet Mr. Pomeroy claims that the following cases, involving fiduciary relations, rest upon this principle: Moss v. Moss, 95 Ill. 449; Dodge v. Cole, 97 Ill. 338; Jones v. Dexter, 130 Mass. 380; Railroad v. Mellen, 44 Mich. 321, 6 N. W. Rep. 845; Church v. Sterling, 16 Conn. 388; Bancroft v. Consen, 13 Allen, 50; Robb's Appeal, 41 Pa. St. 45; Oliver v. Piatt, 3 How. 333, 341; Jenkins v. Frink, 30 Cal. 586; Mitchell v. Reed, 61 N. Y. 123–139; Leach v. Leach, 18 Pick. 68–76; 1 Pom. Eq. Jur. §§ 420–422; 2 Pom. Eq. Jur. §§ 578, 579, 1049; Snell, Eq. 46; 2 Spence, Eq. Jur. 204; Adam, Eq. 60–184.)

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## Maxim 6. Where equities are equal in other respects, the first in order of time shall prevail.

(2 Johns. Ch. 603.)

BERRY v. MUTUAL INSURANCE CO.

(*Court of Chancery of New York.* 1817.)

THE CHANCELLOR. The equitable rights of the parties, in this case, must have reference to the time when the knowledge of their respective mortgages was communicated to each other, in the winter of 1814, and prior to the registry of the elder mortgage. The subsequent registry by the plaintiffs was of no avail. The rights of the parties had become *fixed*, by means of the *notice*, previously, mutually and concurrently given, and which notice, as to them, answered all the purpose and object of a registry. Priority of registry never prevails over a previous notice of an unregistered mortgage. (10 *Johns. Rep.* 461, 2.) In considering this case, then, I shall place entirely out of view the fact of the registry. The real point in the case is, which of the unregistered mortgages had the preference in equity, when the information of their existence was given and received.

If there be several equitable interests affecting the same estate, they will, if the equities are otherwise equal, attach upon it, according to the periods at which they commenced; for it is a maxim of equity, as well as of law, that *qui prior est tempore potior est jure*. This rule has been repeatedly declared; (*Clarke* v. *Abbot*, 2 *Eq. Cas. Abr.* 606. pl. 41. *Bristol* v. *Hungerford*, 2 *Vern.* 525. *Symmes* v. *Symonds*, 1 *Bro. P. C.* 66. [4 Bro. P. C. (2d Ed.) 328.] *Brace* v. *Marlborough*, 2 *P. Wms.* 492. 495,) and we are to see if there be any thing in this case to prevent the application of it.

There is no fraud charged or proved upon the plaintiffs, and if they are to be postponed, notwithstanding they have the elder mortgage, it must be on the ground of culpable negligence, either in leaving the lease with the mortgagor, when they took the mortgage of his term, or in not causing their mortgage to be seasonably registered. I feel strongly disposed to give to these circumstances all the weight to which they can be entitled.

1. It is understood to have been the old rule in the *English* chancery, that if a person took a mortgage, and voluntarily left the title deeds with the mortgagor, he was to be postponed to a subsequent mortgagee, without notice, and who was in possession of the title deeds. The reason of the rule was, that, by leaving the title deeds, he enabled the mortgagor to impose upon others who have no registry to resort to, except in the counties of *Yorkshire* and *Middlesex*, and who, therefore, can only look for their security to the title deeds, and the possession of the mortgagor. The rule was so understood and declared, by Mr. Justice *Burnet*, in *Ryall* v. *Rolle*, (1 *Atk.* 168. 172. 1 *Vesey*, 360.) and by Mr. Justice *Buller*, in *Goodtitle* v. *Morgan*, (1 *Term Rep.* 762.) and there are decisions which have given great weight to the circumstance of the title deeds being in possession of the junior mortgagee. Thus, in *Head* v. *Egerton*, (3 *P. Wms.* 279.) the lord chancellor said, it was hard enough upon a subsequent mortgagee, that he had lent his money upon lands subject to a prior mortgage, without notice of it, and, therefore, he could not add to his hardship, by taking away from him the title deeds, and giving them to the elder mortgagee, unless the first mortgagee paid him his money; especially as the first mortgagee, by leaving the title deeds with the mortgagor, had been, in some measure, accessary in drawing in the defendant to lend him money. This case, however, so far from establishing what was supposed to be the old rule of equity, evidently contradicts it, and admits the better title in the

first mortgagee. So, in the case of *Stanhope* v. *Verney*,* before Lord *Northington*, (*Butler's note to Co. Litt.* 290. 296. § 13.) the second mortgagee, without notice, had possession of the title deeds, but the chancellor did not give him the preference on that single circumstance, but because he also had got possession of an outstanding term. There does not seem, therefore, to be the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; and if there was, a different rule has been since established. It is now the settled *English* doctrine, that the mere circumstance of leaving the title deeds with the mortgagor, is not, *of itself*, sufficient to postpone the first mortgagee, and to give the preference to a second mortgagee, who takes the title deeds with his mortgage, and without notice of the prior encumbrance. There must be fraud, or gross negligence, which amounts to it, to defeat the prior mortgage. There must be something like a voluntary, distinct, and unjustifiable *concurrence*, on the part of the first mortgagee, to the mortgagor's retaining the title deeds, before he shall be postponed. Lord *Thurlow*, in *Tourle* v. *Rand*, (2 *Bro.* 650.) said, he did not conceive of any other rule by which the first mortgagee was to be postponed, but fraud or gross negligence, and that the mere fact of not taking the title deeds was not sufficient; and that if there were any cases to the contrary, he wished they had been named. So the rule was also understood by Chief Baron *Eyre*, in *Plumb* v. *Fluitt*, (2 *Anst.* 432.) and has since been repeatedly recognized. (Lord *Eldon*, in 6 *Vesey*, 183. 190. Sir *William Grant*, in 12 *Vesey*, 130. 1 *Fonb. Eq.* 153, 155, note.) It is admitted, by these same high authorities, to be just, that the mortgagee, who leaves the title deeds with the mortgagor, so as to enable him to commit a fraud, by holding himself out as absolute owner, should be postponed; but the established doctrine is, that nothing but fraud, express or implied, will postpone him.

2. The hardship and abuse complained of in the *English* cases, arise from the want of a general registry act, under which a second mortgagee can always secure himself. I believe there are no registry acts in *England*, except in certain counties, as *Yorkshire* and *Middlesex;* and the provision in such cases, (see stat. 3 and 4 *Ann*, ch. 4.) is similar to that in our act concerning mortgages, and gives the subsequent purchaser, or mortgagee, the preference, *if the memorial of his deed be first registered.* It has been decided, in *Johnson* v. *Stagg*, (2 *Johns. Rep.* 510.) that our act concerning the registry of mortgages extends to leases for years, assigned by way of mortgage; and that the leaving of the lease with the mortgagor, was no evidence of fraud, because the registry of the mortgage was a beneficial substitute for the deposit of the deed, and gave better and more effectual security to subsequent mortgagees. The registry of the mortgage is notice; and if the first mortgagee neither takes the title deeds, nor registers his mortgage, he only exposes himself, and not the subsequent purchaser, or mortgagee. The statute expressly secures the *bona fide* purchaser, and it equally enables the subsequent mortgagee to secure himself, *by registering his mortgage.*

We have seen that the leaving the title deeds with the mortgagor is no prejudice to the first mortgage; and there is the less necessity for it with us than in *England*, because, with us, the creditor who subsequently, and without notice of any prior unregistered mortgage, deals with the mortgagor, can always protect himself in the easiest and most effectual manner; and, supposing he omits to do it, by a misplaced confidence in the mortgagor, has he any equitable claim to be preferred to a prior mortgagee, who, under the same misplaced confidence, has equally omitted to do it? This is the turning point in the present case.

The first mortgage was valid without registry. The statute does not render a registry indispensable. The omission of the registry only exposes the mortgagee to the hazard of a loss of his lien by a subsequent *bona fide* purchase, or to the hazard of a postponement of his lien to a subsequent *registered* mortgage. A second mortgage will not, *per se*, and without registry, gain a preference. There is no such principle to be deduced from the statute, and there is no reason or necessity for it in the nature of the case. The reason why a *bona fide* purchaser is expressly excepted from the operation of an unregistered mortgage is, that he could not otherwise deal with safety, and would be exposed, even with the utmost vigilance, to the frauds of the mortgagor. The act does not provide for the registry of *his* deed, but only for the registry of mortgages, and gives them a preference according to the priority of the registry. The second mortgagee protects himself by his registry, but the purchaser does not, and cannot; and, therefore, the statute declares that his deed shall absolutely prevail over the unregistered mortgage. The statute of 3 and 4 *Ann*, relative to the west riding of *Yorkshire*, provides for the registry of deeds and mortgages promiscuously, and, therefore, places them upon an equal footing.

Though, in one sense, every mortgage is a purchase, yet the mortgage act evidently speaks of purchasers, in the popular sense, as those who take an absolute estate in fee. There is no pretext for considering a mere mortgagee as a purchaser, within the meaning of the second section of the *act concerning mortgages.*

I have not been able to discover any principle of law or equity that will enable me to say, that the first mortgage is to be deprived of its advantage of priority of time. The

* 2 Eden, 81.

omission to register the mortgage was not capable of producing any mischief to third persons, who would use ordinary diligence and precaution. The defendants ought not to charge a negligence upon the plaintiffs of which they have been equally guilty. It was their own fault or folly that they were not protected. They trusted to the assurances of the mortgagor that his land was unencumbered; and the plaintiffs trusted equally in the mortgagor, that he would not, afterwards, sell or mortgage the land. It is a common rule, say the books, that where of two persons, equally innocent, or equally blamable, one must suffer, the loss shall be left with him on whom it has fallen; and here comes in the other rule, that the equities being otherwise equal, the priority of time must determine the right.

It is very clear that the first mortgagee was not bound to register his mortgage, because the law makes it valid, as between the parties, without registry. The registry is only a matter of precaution, and the statute has provided against all the mischief of the omission. If the party will not avail himself of the means of safety provided by statute, he cannot expect that this Court will grant him further aid, and especially against a party whom he charges with no fraud. If relief is ever given in any case, on the ground of policy, or constructive fraud, against the sale or mortgage of property, it is because, from the non-delivery of possession, or from other circumstances, *imposition* had or might have been practised, which could not be detected or guarded against by the exercise of ordinary diligence. No such ground for relief exists in this case.

I am, accordingly, of opinion, that the plaintiffs are entitled to relief, according to the prayer of their bill, and that the defendants are either to account to them for the amount due on their bond and mortgage, or that the residue of the term be sold for the satisfaction of their debt. The costs of suit are to be paid out of the property mortgaged.

Decree accordingly.

(See, also, 1 Pom. Eq. Jur. §§ 413–415, 678. Also, Snell, Eq. p. 31; Adams, Eq. 151; Story, Eq. Jur. § 64*c*; Rice v. Rice, 2 Drew, 73; Fitzsimmons v. Ogden, 7 Cranch, 2; Muir v. Schenck, 3 Hill, 228; Cherry v. Monro, 2 Barb. Ch. 618; Philips v. Philips, 4 De Gex, F. & J. 208–215; Cory v. Eyre, 1 De Gex, J. & S. 149–167; Newton v. Newton, L. R. 6 Eq. 135, 140, 141; Brace v. Duchess of Marlborough, 2 P. Wms. 491; Mackreth v. Symmons, 15 Ves. 354.)

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## Maxim 7. Where there are equal equities the law must prevail.

(See Appendix, p. 109.)

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(7 Cranch, 34.)

SHIRRAS v. CAIG.

(*Supreme Court of the United States.* 1812.)

MARSHALL, Ch. J. delivered the opinion of the Court as follows:

This is an appeal from a decree rendered by the Circuit Court for the district of Georgia.

Shirras and others, the Appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the first of December, 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The Court will proceed to inquire what that interest was.

It appears that, on the 17th May, 1796, the premises were conveyed to James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and co-partners of the city of Savannah.

In 1799, this partnership was dissolved; and, in December in the same year, James Gairdner made an entry on the books of the company charging this property to Edwin Gairdner & Co. of Charleston, at the price of 20,000 dollars. This firm consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney authorizing Edwin Gairdner to sell and convey his interest in this and other real property.

In March, 1801, a partnership was formed between Edwin Gairdner and John Caig to carry on trade in Savannah, under the firm [name] of Edwin Gairdner & Co.; and in the same month, Robert Mitchel, conveyed his one third of the lots in question to Edwin Gairdner and John Caig.

About the same time it was agreed between the house at Charleston and that in Savannah to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner and Co. of Savannah.

Such was the state of title in December, 1801, when the deed of mortgage bears date.

The Plaintiffs claim the whole property, or, if not the whole, five sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the Court is of opinion that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner—he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently the

power of attorney may be put out of the case, and the conveyance could only operate on his own legal or equitable interest.

In law, he was seized under the original deed, and the deed from Robert Mitchel of one undivided moiety of the property.

Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest. In law and equity he held one moiety of the premises in question. The other moiety was in John Caig. To one sixth Caig was legally entitled by the conveyance from Robert Mitchel, and to two sixths he was equitably entitled by the agreement with Edwin Gairdner and the consequent entries on the books.

Of the equitable interest of John Caig the mortgagees were bound to take notice, because the purchaser of an equitable interest, purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property.

The mortgage deed of December, 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed respecting the extent of the property comprehended in it. The Plaintiffs contend that both lots are within the description; the Defendants that only the wharf lot is conveyed.

The property conveyed is thus described: "All that lot of land, houses and wharfs in "the city of Savannah as is particularly de-"scribed by the annexed plat, and is general-"ly known by the name of Gairdner's "wharf."

The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of a part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected.

The words descriptive of the property intended to be conveyed do not appear to the Court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe that lot No. 6 was "generally known by the name of Gairdner's "wharf." The Court, therefore, cannot consider that lot as comprehended within the conveyance.

The mortgaged property is in possession of the Defendants Caig and Mitchel, who derive their title thereto in the following manner.

On the 7th of January, 1802, a new partnership was formed between Gairdner, Caig and Mitchel, and, by the articles of co-partnery, which are under seal, the Savannah property is declared to be stock in trade, and an entry was made on the books of the old firm transferring this property to the new concern. On the 12th of the same month, the co-partnership of Gairdner and Caig was dissolved.

On the 27th of July, 1802, by deeds properly executed, one third of the property became vested in John Caig, and one other third in Robert Mitchel.

On the 3d of November, 1802 Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because they say,

1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy.

2d. That the transaction is not bona fide, there being no real debt, nor any money actually advanced by the mortgagees.

3d. That the mortgage was kept secret, instead of being committed to record.

4th. That the whole transaction is totally variant from that stated in the deed.

They therefore claim the property for the creditors of Gairdner, Caig and Mitchel.

1st. From the testimony in the cause it appears that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent.

2d. It appears, also, that the mortgage was executed, in part, to secure the payment of money actually due at the time, and, in part, to secure sums to be advanced, and to indemnify some of the mortgagees for liabilities to be incurred.

3d. The mortgage is dated the 1st of December, 1801, and was recorded in September, 1802.

By the laws of Georgia, a deed is valid if recorded within twelve months; but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or previously on the record.

It appears to the Court, that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the despatch which the law requires. If subsequent purchasers without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition.

In this case the subsequent purchasers might have proceeded to record their deeds within ten days, and have thereby obtained the preference they claim, but they have failed to do so. They are themselves chargeable with the very negligence which they ascribe to their adversaries; and, were they to be preferred, the Court would invert the well established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

4th. It is true that the real transaction

does not appear on the face of the mortgage. The deed purports to secure a debt of 30,000*l.* sterling due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied, that a deed, which misrepresents the transaction it recites, and in the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly, always advisable fairly and plainly to state the truth.

But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.

That cannot have happened in the present case.

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgagor himself, and executed without being inspected by them, so far as appears in the case.

It is then, the opinion of the Court that the Plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot, or parcel of ground, commonly known by the name of Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the Defendants, Caig and Mitchel; and that the decree of the Circuit Court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

*The following is the decree of this Court.*

This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof it is the opinion of this Court, that the deed of mortgage in the proceedings mentioned, and dated on the 1st of December, 1801, is, in law, a valid conveyance of one moiety of that lot of land, houses and Wharves in the City of Savannah, which was generally known by the name of Gairdner's Wharf, being the parcel of ground lying between the river and the street, and that the mortgagees in the said deed mentioned, are entitled to foreclose the equity of redemption in the said mortgaged property, and to obtain a sale thereof, and to apply the proceeds of the said sale to the payment of what remains unsatisfied of their respective debts, which were either due at the date of the mortgage, or have been since contracted, either on account of monies advanced, or liabilities incurred prior to their receiving actual notice of the title of the Defendants, John Caig, and Robert Mitchel. And the decree of the Circuit Court for the District of Georgia, so far as it is inconsistent with this opinion, is reversed and annulled, and in all other things is affirmed; and the cause is remanded to the said Circuit Court for the District of Georgia, that further proceedings may be had therein according to equity.

(See, also, 1 Pom. Eq. Jur. §§ 416, 417; Snell, Eq. 23; 1 Story, Eq. Jur. § 64*c*; Thorndike v. Hunt, 3 De Gex & J. 563, 570; Caldwell v. Ball, 1 Term R. 214; Newton v. McLean, 41 Barb. 285; Jerrard v. Saunders, 2 Ves. Jr. 454; Wallwyn v. Lee, 9 Ves. 24; Vattier v. Hinde, 7 Pet. 252.)

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## Maxim 8. Equality is equity.

(1 Ohio St. 327.)

RUSSELL v. FAILOR.

(*Supreme Court of Ohio.* January, 1853.)

Where one of several sureties pays the debt of the principal, such surety is entitled to contribution from the others, upon the principle that equality is equity.

BARTLEY, C. J. The errors assigned in this case are substantially the following:

1st. That the court erred in holding that the note was void, and that the payment of the same by the plaintiff gave him no right of action against the defendant for contribution.

2d. That the court erred in overruling the motion for a new trial, &c.

Two questions are here presented for determination:

1st. Was the note void on the ground of usury?

2d. Can a surety on a promissory note which is absolutely void, by the voluntary payment thereof, entitle himself to contribution against the co-surety?

The first question has been determined in the affirmative by adjudications already made in this State. See the case of *The Preble Branch of the State Bank of Ohio* v. *William Russell and others*, 1 Ohio St. 313; also, *Chillicothe Bank* v. *Swayne*, 8 Ohio Rep. 257. *Creed* v. *The Commercial Bank of Cincinnati*, 11 Ohio Rep. 489; *The Miami Exporting Company* v. *Clark*, 13 Ohio Rep. 1; *Commercial Bank* v. *Reed*, 11 Ohio Rep. 498; *United States Bank* v. *Owens*, 2 Peters' Rep. 538.

The second question is one which does not appear to have been very frequently presented for adjudication.

The right of contribution among sureties is founded not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits. The common law has adopted and given effect

to this equitable principle, on which a surety is entitled to contribution from his co-surety. This equitable obligation to contribute, having been established, the law raises an implied assumpsit on the part of the co-surety to pay his share of the loss, resulting from a concurrent liability to pay a common debt. This jurisdiction, by an action at law, is, therefore, resorted to, when the case is not complicated; and the more extensive and efficient aid of a court of equity is thus rendered unnecessary. It follows that this action can only be sustained where there exists a just and equitable ground for contribution.

A contract of suretyship is accessary to an obligation contracted by another person, either contemporaneously, or previously, or subsequently. It is of the essence of the contract, that there be a subsisting valid obligation of a principal debtor. Without a principal, there can be no accessory; and by the extinction of the former, the latter becomes extinct. This results from the nature of the obligation of suretyship. Burge on Suretyship, 3 & 6; Theobald on Prin. and Surety, 2.

It would seem to follow, from the very nature of the undertaking, that if the principal contract is absolutely void, the obligation of the surety would likewise be void. But it is said, that where the contract of the principal debtor is only voidable on account of incapacity or otherwise, and the person undertaking as surety contracted with a knowledge of the incapacity or other cause making the principal obligation voidable, he must be understood as incurring not merely a collateral, but a principal obligation. How far this may extend, as between surety and principal, it is not necessary here to enquire; but there seems to be sound reason in the doctrine, that where the surety has knowledge of that which amounts to a valid defence for him against the creditor, he is bound either to avail himself of it, or to give notice to the principal debtor, so as to enable him to set up the defence; and in default of doing either, he would be deprived of recourse against the principal. Burge on Suretyship, 367.

The utmost extent to which a surety, who has made payment can claim, is a subrogation to the rights of the creditor, so that he will rank against the debtor in the same degree as the creditor would have done, if he had not been paid. Where, therefore, a surety could have no remedy against the principal, he clearly could have none against his co-surety, against whom he would have less equity in his favor.

Such, then, being the nature of the contract of suretyship, To what right of contribution was the plaintiff entitled in this case against the defendant? The claim set up by the branch bank was absolutely void; and it could have acquired no validity from the execution of the mortgage by the plaintiff before he had notice of the usury, especially as against the defendant. And it appears that the plaintiff had knowledge of the usury before he paid the debt. With what pretence of equity can the plaintiff, who was not bound himself, by voluntarily paying a void note, claim to impose an obligation upon the defendant as his co-surety, who was under no obligation before, either legal or equitable? Had the creditor instituted a suit on the note against the defendant, his remedy was clear and complete; and he could not certainly have been deprived of his means of defence by the voluntary act of the plaintiff. This is clearly not a case where an implied assumpsit could have been raised against a co-surety for contribution.

The principle laid down in the case of *Skillin* v. *Merrill*, 16 Mass. R. 40, would seem to be in point in this case, and fatal to the plaintiff's cause of action. And it is not shaken by the case of *Ford* v. *Keith*, 1 Mass. R. 139, and the case decided upon its authority, of *Cave* v. *Burns*, 6 Ala. R. 780, to which reference has been made. The two last cases are not strictly analogous to the present one. Upon no principle of justice or sound reason can a surety, by voluntarily paying money on a void note, impose an obligation upon a co-surety for contribution.

*Judgment affirmed.*

(See, also, 1 Pom. Eq. Jur. §§ 405-411; 3 Pom. Eq. Jur. § 1418; Adams, Eq. p. 267, note; Snell, Eq. 43; 1 Story, Eq. Jur. § 64; Carter v. Penn, 99 Ill. 390; Kites v. Church, 142 Mass. 586, 8 N. E. Rep. 743; Campbell v. Mesier, 4 Johns. Ch. 334; Gring's Appeal, 89 Pa. St. 336; 52 Mich. 143, 17 N. W. Rep. 731; 84 N. Y. 363; Rigden v. Vallier, 2 Ves. Sr. 258; Morley v. Bird, 3 Ves. 631.)

(See post, "Insolvent Estates" and "Marshaling Assets.")

## Maxim 9. Equity will not suffer a wrong without a remedy.

[Snell, Eq. p. 16: "The maxim must, however, be understood with the following limitations: It must be understood as referring to rights which come within a class enforceable at law, or capable of being judicially enforced, and the enforcement of which would not occasion a greater detriment or inconvenience to the public than would result in leaving them to be disposed of *in foro conscientiæ;* and it must also be understood as referring to cases where there is no equal or superior adverse right or adverse equity in the private individual who is made defendant, and to cases where the plaintiff who is remediless at law has not lost his remedy there by his own conduct or default. *And it must also be remembered that many real wrongs are not remediable at all, either at law or in equity; and that a still larger class of apparent wrongs are not wrongs at all, excepting in the imagination of the suitor. Of course the maxim does not apply to such.*"]

S. S

(19 Wall. 107.)

REES v. CITY OF WATERTOWN.

(*Supreme Court of the United States.* 1873.)

Mr. Justice HUNT delivered the opinion of the court.

This case is free from the objections usually made to a recovery upon municipal bonds. It is beyond doubt that the bonds were issued by the authority of an act of the legislature of the State of Wisconsin, and in the manner prescribed by the statute. It is not denied that the railroad, in aid of the construction of which they were issued, has been built, and was put in operation.

Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it.

There is, however, a grave question of the power of the court to grant the relief asked for.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

In the case of *Supervisors* v. *Rogers*,* an order was made by this court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the State of Iowa, and the proceeding was taken by the express authority of a statute of that State. The court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the code of the State of Iowa. This proceeding is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an attachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State and the peremptory mandate of the court."

The State of Wisconsin, of which the city of Watertown is a municipal corporation, has passed no such act. The case of *Supervisors* v. *Rogers* is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus.† This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

In *Welch* v. *St. Genevieve*,* at a Circuit Court for the district of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city (Mr. Reynolds as *amicus curiæ* only); no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion

*7 Wallace, 175.

†Riggs *v.* Johnson County, 6 Wallace, 193.

*10 American Law Register, New Series, 512.

of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of *Riggs* v. *Johnson County*,† and *Lansing* v. *Treasurer*.‡ The first case cited does not touch the present point. The question in that case was whether a mandamus having been issued by a United States court in the regular course of proceedings, its operation could be stayed by an injunction from the State court, and it was held that it could not be. It is probable that the case of *Supervisors* v. *Rogers*§ was the one intended to be cited. This case has already been considered.

The case of *Lansing* v. *Treasurer* (also cited), arose within the State of Iowa. It fell within the case of *Supervisors* v. *Rogers*, and was rightly decided because authorized by the express statute of the State of Iowa. It offered no precedent for the decision of a case arising in a State where such a statute does not exist.

These are the only authorities upon the power of this court to direct the levy of a tax under the circumstances existing in this case to which our attention has been called.

The plaintiff insists that the court may accomplish the same result under a different name, that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of State taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and the general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void.* But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint.†

By section nine of the defendant's charter it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.‡

But independently of this statute, upon the general principles of law and of equity

†6 Wallace, 166.

‡9 American Law Register, N. S. 415.

§7 Wallace, 175.

*Van Hoffman *v.* City of Quincy, 4 Wallace, 535.

†Cooley, Constitutional Limitations, 285, 287.

‡Cooley, Constitutional Limitations, 285.

jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon conscience and moral duty only, unconnected with legal obligations. Judge Story says,† "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says:‡ "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.*

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defence.†

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."‡ In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants of the town, naming it; the individual inhabitants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them.* This is local law peculiar to New England. It is not the law of this country generally, or of England.‖ It has never been held to be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States.¶ So far as it rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those States where provision is made for compulsory taxation to satisfy judgments against a town or city.§

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric* v. *Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . To enforce this right against the inhabitants of a county would lead to such a multiplicity

†1 Equity Jurisprudence, § 61.

‡Heard v. Stanford, Cases Tempore Talbot, 174.

*1 Story's Equity Jurisprudence, § 60.

†Westervelt v. Gregg, 12 New York, 209.

‡Ib.

*See the cases collected in Cooley's Constitutional Limitations, 240-245.

‖Russell v. Men of Devon, 2 Term R. 667.

¶See Emeric v. Gilman, 10 California, 408, where all the cases are collected.

§Cooley's Constitutional Limitations, 246.

of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor himself, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law.*

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

JUDGMENT AFFIRMED.

*1 Story's Equity Jurisprudence, § 470 and onwards.

(See, also, 1 Pom. Eq. Jur. §§ 423, 424; Id. §§ 63, 67, 130; Finnegan v. Fernandina, 15 Fla. 379; Heine v. Levee Com'rs, 19 Wall. 655.)

## Maxim 10. Equity in certain cases follows the law.

(2 P. Wms. 720.)

COWPER v. COWPER.

(*High Court of Chancery of England.* 1734.)

Equitable estates are guided by the rules which guide legal estates as to descent.

ABSTRACT OF OPINION.

"The law is clear, and the courts of equity ought to follow it in their judgments, concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; * * * and as it is said in Rooke's Case, 5 Coke, 99*b*, that discretion is a science, —not to act arbitrarily according to men's wills and private affections,—so the discretion which is exercised here is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion in some cases follows the law implicitly; in others assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court."

(See, also, 1 Pom. Eq. Jur. §§ 425–427; Snell, Eq. p. 14; 1 Story, Eq. Jur. p. 60 et seq.; Smith v. Clay, Amb. 645; Bond v. Hopkins, 1 Schoales & L. 429; Cholmoudeley v. Clinton, 2 Jac. & W. 141; McKnight v. Taylor, 1 How. 161; Tatam v. Williams, 3 Hare, 358; Ault v. Goodrich, 4 Russ. 430; Barber v. Barber, 18 Ves. 286; Miller's Heira v. McIntyre, 6 Pet. 61; Coulson v. Walton, 9 Pet. 62; Smith

## Maxim 11. Equity acts in personam and not in rem.

(94 U. S. 444.)

MULLER v. DOWS.

(*Supreme Court of the United States.* 1876.)

Courts of equity acting *in personam* may decree a sale of an entire railroad, though a part of it lies in one state and a part in another.

MR. JUSTICE STRONG delivered the opinion of the court.

The decree made below is assailed here for several reasons. The first is, that the court had no jurisdiction of the suit, in consequence of the want of proper and necessary citizenship of the parties. This objection was not taken in the Circuit Court, but it is of such a nature, that, if well founded, it must be regarded as fatal to the decree. The bill avers that Dows and Winston, two of the complainants, are citizens and residents of the State of New York, and that Burnes, the other complainant, is a citizen and resident of the State of Missouri. The two original defendants, the Chicago and South-western Railway Company, and the Chicago, Rock Island, and Pacific Railroad Company, are averred to be citizens of the State of Iowa. Were this all that the pleadings exhibit of the citizenship of the parties, it would not be enough to give the Circuit Court jurisdiction of the case. In *The Lafayette Insurance Company* v. *French et al.*, 18 How. 404, a similar averment was held to be insufficient, because it did not appear from it that the Lafayette Insurance Company was a corporation; or, if it was, that it did not appear by the law of what State it was made a corporation. It was therefore ruled, that, if the defective averment had not been otherwise supplied, the suit must have been dismissed. A corporation itself can be a citizen of no State in the sense in which the word "citizen" is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the State which, by its laws, created the corporation. It is, therefore, necessary that it be made to appear that the artificial being was brought into existence by the law of some State other than that of which the adverse party is a citizen. Such an averment is usually made in the introduction, or in the stating part of the bill. It is always there made, if the bill is formally drafted. But if made anywhere in the pleadings, it is sufficient. In *The Lafayette Insurance Company* v. *French et al.*, *supra*, the defective averment of citizenship was held to have been supplied by the plaintiff's replication to the plea, which alleged that the defendants were a corporation created under the laws of Indiana, having its principal place of business in that State. And, in the present case, we think the averment in the introduction of the bill, that the two defendant corporations were citizens of Iowa, which, if standing alone, would be insufficient to show jurisdiction in the Federal court, has been supplemented by other averments which satisfactorily show that the court had jurisdiction of the case. The bill in its stating part alleges that the Chicago and South-western Railway Company, of the State of Iowa, was organized by the adoption of articles of association in the manner provided by the laws of said State, and that, with all the powers, rights, and privileges granted and conferred on corporations by the then existing laws of the said State, it assumed to act. The articles of association are appended to the bill as an exhibit, and made part of it by proper reference. So are the articles of consolidation with a corporation of the same name of Missouri, in which the Chicago and South-western Railway Company in Iowa is recited to be a body politic and corporate, organized and existing under and by virtue of the laws of the State of Iowa. The averments of the bill were generally admitted in the answers of both the defendant companies. But this is not all. Throughout the pleadings, the corporate existence under the laws of Iowa of both the companies is either admitted or asserted by all the original parties, and by the appellants, who were made parties after the suit had been some time in progress. The petition of the appellants to be made parties adopted another petition, in which it was alleged that the Chicago, Rock Island, and Pacific Railroad Company was and is a corporation organized under and in pursuance of the laws of the States of Illinois and Iowa, and that the Chicago and South-western Railway Company was and is a corporation created under and by virtue of the laws of the States of Missouri and Iowa. Having been made parties, the appellants filed cross-bills against the present complainants and the two companies, in which they repeated the averments they had previously adopted; and the answer to the cross-bill made by all the defendants therein expressly admitted them. The record is thus seen to be full of showing that both the defendant corporations derived their existence as corporate bodies under the laws of Iowa, at least in part, and that they were corporations of that State.

Still, it is argued on behalf of the appellants that the Chicago and South-western Railway Company cannot claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name, chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence, it is argued the corporation was created by the laws of Iowa and of Missouri; and as

Burnes, one of the plaintiffs, is a citizen of Missouri, it is inferred that the Circuit Court had no jurisdiction. We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the State with others outside of the State, were that any railroad company organized under the laws of the State, or that might thus be organized, should have power to intersect, join, and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the State line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized to "merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected." The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and South-western railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa. It is, however, unnecessary to discuss this subject further. Doubt in regard to it is put at rest by the decision of this court in *Railway Company* v. *Whitton's Administrator*, 13 Wall. 270. There a similar question arose. A suit was brought by a citizen of Illinois in the State of Wisconsin, and it became a question whether the Federal Circuit Court of the latter State could entertain jurisdiction. The company, sued at first in the State court, resisted an application to remove the case into the United States Circuit Court, on affidavits that it was a corporation created by and existing under the laws of the States of Illinois, Wisconsin, and Michigan; that its line of railway was located, in part, in each of these States; that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exercised, and its affairs managed and controlled, by one board of directors and officers; that its principal office and place of business was at the city of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin. Nevertheless, the Circuit Court took jurisdiction of the case; and this court held correctly, remarking that "the defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or citizen of any other State. Being there sued, it can only be brought into court as a citizen of that State, whatever its *status* or citizenship may be elsewhere." In view of this decision it must be held that the objection to the jurisdiction of the Circuit Court of Iowa is unsustainable.

The next objection urged against the decree of the court below is, that it is void so far as it directed the usual foreclosure and sale of property not within the territorial jurisdiction of the court. A part of the Chicago and South-western Railway is in the State of Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the State of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the master, who was ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser. It also declared that after the sale both the defendant corporations and the complainants' trustees named in the mortgage, as well as all persons claiming under them or either of them, be barred and foreclosed from all interest, estate, right, claim, or equity of redemption of, in, and to the property, reserving, however, the rights of the holders of the bonds and coupons secured by the first mortgage, then remaining outstanding and unpaid. It directed that the two defendant corporations should surrender to the purchaser the property sold and conveyed, upon the execution, approval, and delivery of the master's deed; and that, as further assurance, the Chicago and South-western Railway Company should, on the approval and delivery of the master's deed, convey all the property therein described to the purchaser, by their good and sufficient deed.

If such a foreclosure and sale cannot be made of a railroad which crosses a State line and is within two States, when the entire line is subject to one mortgage, it is certainly to be regretted, and to hold that it cannot be would be disastrous, not only to the companies that own the road, but to the holders of bonds secured by the mortgage. Multitudes of bridges span navigable streams in the United States, streams that are boundaries of two States. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors? A vast number of railroads, partly in one State and partly in an adjoining State, forming continuous lines, have been constructed by consolidated companies, and mortgaged as entireties. It would be safe to say that more than one hundred millions of dollars have been invested on the faith of such mortgages. In many cases these investments are insufficiently secure at the best. But if the railroad, under legal process, can be sold only in fragments; if, as in this case, where the mortgage is upon the whole line, and includes the franchises of the corporation which made the mortgage, the decree of foreclosure and sale can reach only the part of the road which is within the State, —it is plain that the property must be comparatively worthless at the sale. A part of a railroad may be of little value when its ownership is severed from the ownership of another part. And the franchise of the company is not capable of division. In view of this, before we can set aside the decree

which was made, it ought to be made clearly to appear beyond the power of the court. Without reference to the English chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True, it cannot send its process into that other State, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In *McElrath* v. *The Pittsburg & Steubenville Railroad Co.*, 55 Penn. St. 189,—a bill for foreclosure of a mortgage,—in which it appeared that a railroad company, whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia as that in Pennsylvania. This case is directly in point, and tends to justify the decree made in the present case. The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance. And the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made.

The next objection urged by the appellants is, that the bill for a foreclosure and all the proceedings therein were collusive. It is said the suit was instituted by collusion between the trustees and the Rock Island and South-western Railroad Companies, for the purpose of destroying the lien of the Atchinson branch bondholders on the main line of the South-western Railway, and to enable the Rock Island company to obtain the title to the main line, discharged from any lien or claim on the part of such bondholders. After careful examination of the evidence, we have failed to find anything that justifies this objection. And certainly, if there was collusion in bringing and conducting the suit, the appellants have not been injured by it. They were permitted to come in as parties defendant, and they had full opportunity to assert their equities.

The fourth objection is general. It is, that, at the time of filing the bill, no right of foreclosure existed in favor of the complainant trustees for the benefit of the Chicago and Rock Island Railway Company, or, if such a right did exist, that it had been waived. In respect to this objection we have to remark, that unless the right to a foreclosure had been waived by the Rock Island company, we discover no foundation for the assertion that there was no right of foreclosure when the suit was brought. That company had indorsed $5,000,000 of the bonds of the South-western company secured by the mortgage; and, in consequence of the indorsement, had paid coupons for interest of the bonds to a large amount. The mortgage stipulated that it might be foreclosed, in case of failure by the mortgagor to pay the interest; and it stipulated further, that in case the Rock Island company should, in consequence of its guaranty, pay any of the bonds or coupons, the mortgage might be foreclosed at their instance. The right to foreclose at the instance of the Rock Island company was expressly given. Was there any waiver of this right? We think not. It is said that the contract of July 27, 1871, coupled with the contract of Oct. 1, 1869, constituted a waiver. The contract first made preceded and contemplated the execution of the mortgage. It gave to the Rock Island company the option of furnishing the equipment for the South-western road, or to lease and operate it on such terms as might be agreed upon. Manifestly, this was for an additional security to the guarantors of the bonds, and not for a substituted security. And the contract of July 27, 1871, made between the Rock Island company and the South-western, merely provided that, with regard to the lease of the branch railroad proposed to be constructed by the latter to the Missouri river, opposite Atchinson, it should be used and operated by the Rock Island road in the same manner and on the same terms as the main line of the South-western. The meaning of this is, not that a lease existed, or should be taken, though one may have been contemplated, but that the branch road should be operated in the same manner and on the same terms as the main line might be. How this contract alone, or connected with the contract of Oct. 1, 1869, can be construed as a waiver of a right to sue for foreclosure of the mortgage on the main line, we are unable to comprehend. Nor can we see that the contract of Dec. 4, 1871, called a "lease contract," even if it be regarded as an executed and subsisting contract, can have such an effect. We have heretofore said that the agreement to give and take a lease, dependent on the option of the Rock Island company, was intended as an additional security to that company for its indorsement of the bonds. If we are correct, a lease executed in pursuance of the agreement could be only cumulative security.

Hence, it could be no waiver of the right to foreclose.

But, in fact, there was no lease, nor any agreement for a lease, that could be enforced specifically. The language of the agreement of Oct. 1, 1869, and that of the agreement of July 27, 1871, warrant no interpretation that makes them a lease in law, or in equity. The first, it is true, contemplated the possibility of a lease of the main line, if the terms could be agreed upon; and the latter provided that when such lease should be agreed upon, if ever, it should also embrace the branch line. But the terms never were agreed upon. On the thirtieth day of October, 1871, at a meeting of the executive committee of the Rock Island company, Messrs. Scott and Riddle were appointed a sub-committee "to agree upon the basis of a contract for a running arrangement between the company and the South-western, with directions to report to the general committee when an arrangement should be agreed upon." On the 4th of December, 1871, a proposition was submitted by that sub-committee to the officers of the South-western, and accepted by them. It was a proposition for a lease. But the sub-committee had no authority to agree for the Rock Island company to take a lease, and when, afterwards, they reported their action to the general committee, that committee refused to confirm it. It is vain, therefore, to contend that there was a lease, or any agreement for a lease, that can be enforced. And, even if there was, there is no evidence that one of its terms was that the rent should be sufficient for the payment, and should be applied to the payment of the Atchinson branch bonds.

It is next insisted on behalf of the appellants that the Rock Island company could not ask for a foreclosure of the mortgages until it had accounted for and applied the stock of the South-western company to its indemnification for its guaranty, for which purpose it held such stock as security. The company did hold a large amount of that stock. Whether it held it as an indemnity for the liabilities it had assumed, we do not care to inquire. Assuming that it did, the fact is quite immaterial. It surely cannot be maintained that a surety who held several securities for his indemnity cannot use one of them because he has another to which he might resort.

The fifth particular in which the decree is alleged to have been erroneous is, that it denied the relief for which the appellants prayed in their cross-bill. That relief was the enforcement of what is called the lease contract of Dec. 4, 1871, or the enforcement of the contract of July 27, 1871, by a lease of the branch line, on terms and conditions to be derived from the contract of Oct. 1, 1869; that is to say, the rental to be paid by the Rock Island company to be an amount sufficient to guarantee the principal, or at least the interest, of the Atchinson branch bonds. The answer to this is what we have heretofore said. There was no lease, nor any contract which bound the Rock Island company to take a lease, much less to pay a rental sufficient to guarantee the principal or interest of the Atchinson branch bonds, or to apply the rent to the payment of that principal or interest.

The appellants also, in their cross-bill, prayed in the alternative that the bonds of the branch road, held by them, might be deemed to have been obtained under false and fraudulent pretences, and that the proceeds thereof were paid out by the Rock Island company knowingly, fraudulently, and in violation of a trust assumed by them, and that the said company might be decreed to pay to them the par value of the same and interest.

We have sought in vain for any evidence that would justify a decree that the Rock Island company obtained the bonds of the branch road by fraudulent pretences, or that it knowingly, fraudulently, and in violation of any trust assumed by it, paid out the proceeds of sale of the bonds. By the provisions of the branch mortgage the Rock Island company was made the custodian of the bonds, with power and direction to pay them and their proceeds to the president or other duly authorized agent of the South-western company, in three contingencies: First, upon the delivery of an invoice of articles purchased, approved by the president; second, upon the presentation of monthly estimates by the engineer of the South-western of work done and materials furnished in the construction of the branch railway, approved in the same manner; and, third, on the certificate of the same engineer, approved in like manner, that the road had been completed and was in running order. If this constituted a trust, it was only that of a custodian. The Rock Island company had no right to control the location of the branch road, or the cost of its construction. It was not its duty to supervise the contracts or direct the alignment. Such action would have been outside of its corporate power. If some persons who were its officers undertook to control the expenditure in such a manner as to secure a proper location and construction of the road (of which we discover no sufficient evidence), those persons may be responsible for their breach of duty, if there was any. But no such trust was assumed by the Rock Island company. Certainly, then, there was no undertaking that the branch road should be fifty miles long; and, if it was imperfectly constructed, it appears that the Rock Island company has expended upon its construction a very large sum of its own money, and has made it a first-class Western road. If, then, there was such a trust, as is charged by the appellants, and a breach of it, full compensation has been made, and the appellants have

all the security the trust was intended to give them; *i. e.*, a first mortgage upon a finished first-class road.

The last objection to the decree is, that the relief prayed for by the cross-bills of the two defendant railroad companies should not have been granted, for the following reasons: 1st, If the original suit fails for want of jurisdiction, so must the cross-bills. 2d, The cross-bills were nullities, because filed without leave of the court, and because not making the intervening bondholders parties. 3d, Because collusive. We have seen the court had jurisdiction of the original suit. The permission of the court to file the cross-bills must be presumed from its action upon them, and the intervening bondholders were not parties or necessary parties when the bills were filed. They became parties to the original bill, but they did not ask to be made parties to the cross-bills of the defendant corporations. That the cross-bills were collusive in their origin, purpose, and conduct, if such was the fact, which we do not perceive, is of no importance, since the appellants had an unobstructed opportunity to vindicate their rights. They might, if they had chosen, have become parties defendant to the cross-bills, and, if they had, they could not have resisted the relief given by the court.

The appellants are, no doubt, unfortunate. It may be that they purchased their bonds expecting that the Rock Island company would protect them, either by taking a lease of the branch road, or by holding the purchase-money of the bonds and expending it for their security. But the expectation of a guaranty cannot be treated as a guaranty itself. *Decree affirmed.*

(See, also, 1 Pom. Eq. Jur. §§ 428–431; Snell, Eq. 47.)

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## Maxim 12. Equity regards that as done which, in good faith, ought to be done.

S. 6 111

(3 Wheat. 563–576.)

CRAIG v. LESLIE.

(*Supreme Court of the United States.* 1818.)

Where, in a will, the executor is ordered to sell certain lands, and to pay over the proceeds to a designated person, within a certain time, at the expiration of that time, even if the lands have not been sold, equity will regard that as done which ought to have been done, and will hold the executor responsible for the money.

Robert Craig's will contained the following clause: "I give and bequeath to my brother, Thomas Craig, of Baith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted to him, according as the payments are made." Thomas Craig being an alien, the question was, could he take the proceeds of this land, which had been devised to one Leslie, in trust, the proceeds from the sale of which were to be paid to him?

Mr. Justice WASHINGTON delivered the opinion of the court. The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself.

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

*The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of Fletcher v. Ashburner, (1 *Bro. Ch. Cas.* 497,) the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of the rolls refers, as well as by many others. See Doughty v. Bull, 2 *P. Wms.* 320. Yates v. Compton, *Id.* 308. Trelawney v. Booth, 2 *Atk.* 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and

*Equity considers land, directed to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

*Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. †So that in case of the death of the *cestui que trust*, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of Kirkman v. Milles, (13 *Ves.* 338) which was a devise of real estate to trustees upon trust to sell, and the moneys arising as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A. B. and C. The estate was, upon the death of A. B. and C., considered and treated as personal property, notwithstanding the *cestui que trusts*, after the death of the testator, had entered upon, and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds, "the opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of Edwards v. The Countess of Warwick, (2 *P. Wms.* 171,) which was a covenant on marriage to invest 10,000*l.*, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in *tail male*, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

*This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any farther investigation of it useless, were it not for the case of Roper v. Radcliffe, which was cited, and mainly relied upon, by the counsel for the state of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus or the money to be paid as he, the said John Roper, by his will or otherwise, should appoint, and for want of such appointment, for the benefit of the said John Roper, and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his *real* and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in *lands* or personal estate, he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favour of the papists, was, up-

*Where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money or land at his election, if he elect before the conversion is made.

†But if the *cestui que trust* die, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his lifetime.

*The case of Roper v. Radcliffe, 9 *Mod.* 167, examined.

on appeal to the house of lords, reversed, and the title of the heir at law sustained; six judges against five, being in his favour.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are, 1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. *2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect,) results to the heir at law, as the old use not disposed of. Such was the case of Cruse v. Barley, (3 *P. Wms.* 20,) where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave £200 to A. the eldest son, *at the age of* 21, and the residue to his four younger children. A. died before the age of 21, in consequence of which the bequest to him failed to take effect. The court decided that the £200 should be considered as land to descend to the heir at law of the testator, because it was in effect the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of Ackroyd v. Smithson, (1 *Bro. Ch. Cas.* 503,) is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. (Hewitt v. Wright, 1 *Bro. Ch. Cas.* 86.)

*But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of Yates v. Compton, (2 *P. Wms.* 308,) in which the chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that that was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of Fletcher v. Ashburner, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the case of Emblyn v. Freeman, and Cruse v. Barley, are those where real estate being directed to be sold, some part of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed remains to him, and partakes of the old use, as if it had not been directed to be sold.

*Land, devised to trustees, to sell for payment of debts and legacies, is to be deemed as *money*.

The heir at law has a resulting trust in such lands, after the debts and legacies are paid, and may come into equity and restrain the trustee from selling more than sufficient to pay them, or may offer to pay them himself, and pray a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property in either case will be *land*, and not *money*.

*But if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personalty, not only for the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.

The third proposition laid down in the case of Roper v. Radcliffe, is, that equity will extend the same privilege to *the residuary legatee* which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

*This has, in effect, been admitted in the preceding part of this opinion; because, if the *cestui que trust* of *the whole* beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

†But the court cannot accede to the conclusion, which, in Roper v. Radcliffe, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed *as land* in equity, though in respect to the *creditors* and *specific legatees* it is deemed as money. It is admitted, with this qualification, that if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his life time, the property will then assume the character of land. But if he does not make this election, the property retains the character of personalty to every intent and purpose. The cases before cited seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of Roper v. Radcliffe.

As to the idea that the character of the estate is affected by this *right of election*, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before any thing can be made of the proposition, it should be shown that this right of privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true, that equity will extend this privilege in all cases to the *cestui que trust.* It will be refused if he be an infant. In the case of Seeley v. Jago, (1 *P. Wms.* 389,) where money was devised to be laid out in land in fee, to be settled on A. B. and C., and their heirs, equally to be divided: On the death A., his infant heir, together with B. and C., filed their bill, claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was *incapable of making an election*, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of Foone v. Blount, (*Cowp.* 467,) Lord Mansfield, who is compelled to acknowledge the authority of Roper v. Radcliffe in parallel cases, combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

This case of Walker v. Denne, (2 *Ves. Jun.* 170,) seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, *or on long terms*, with limitations applicable to real estate. The money not having been laid out, the crown on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the *cestui que trusts*, though a *feme covert*, was held a sufficient indication of her intention that it should continue personal against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where *it is desired*, and can be *lawfully made*, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the *cestui que trust* is incapable to take or to hold the land beneficially, the right of election does not exist, and conse-

*Equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveysnce of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

†The conclusion—which, in Roper v. Radcliffe, is deduced from the above principles, that in respect to the residuary legatee such a devise shall be considered as land in equity, though in respect to the *creditors* and *specific legatees*, it is deemed as money—denied.

quently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of Roper v. Radcliffe, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

*The incapacities of a papist under the English statute of 11 and 12 *Wm.* III. c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other *interests* or *profits* whatsoever out of lands, to be made, suffered, or done, to, or for the use of such person, or upon any trust for him, or to, or for the benefit, or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even *take*. His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In Roper v. Radcliffe, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so, (and it is not material in this case to affirm or deny that position,) then the will of John Roper in relation to the bequest to the two papists, *was void* under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestable. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but *the policy* of the statute.

†Now, what is the situation of an alien? He cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received.(*a*) In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat as if the alien had, or could upon the principles of a court of equity, have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of Roper v. Radcliffe has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield in the case of Foone v. Blount, speaks of it with marked disapprobation; and we know, that had Lord Trevor been present, and declared the opinion he had before entertained, the judges would have been equally divided.

The case of the Attorney General and Lord Weymouth, (*Ambler*, 20,) was also pressed upon the court, as strongly supporting that of Roper v. Radcliffe, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the chancellor so considers it; for he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all *charges and encumbrances* on land, for the benefit of a charity.

But if this case were, in all respects, the same as Roper v. Radcliffe, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of the land, was to be taken as personalty or land; and, although he mentions the case of Roper v. Radcliffe, he adds, that he does not depend upon it, as it was immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

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*The case of Roper v. Radcliffe distinguished from the present case.

†An alien may *take*, by purchase, a freehold, or other interest in land, and may *hold* it against all the world except the king; and even against him until office found; and is not accountable for the rents and profits previously received.

(*a*) Vide 3 Wheat. 12. Jackson *ex dem.* State of New York v. Clarke, note *c*.

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(29 Minn. 330, 13 N. W. Rep. 137.)

AMES v. RICHARDSON.

(*Supreme Court of Minnesota.* July 25, 1882.)

On December 16, 1879, C., owning a piece of land, insured a mill, machinery and fixtures therein against damage by fire, in the Western Manufacturers' Mutual Insurance Company, for $2,000. December 18, 1879, C. borrowed of defendant R. $5,200, for which he gave his note on five years, secured by a mortgage of the land mentioned, duly recorded December 22d. By the terms of the mortgage, C. covenanted with R. that, at all times during its continuance, he would keep the buildings on the mortgaged premises unceasingly insured for at least $5,200, payable in case of loss to R., to the amount then secured by the mortgage. December 28, 1879, C. insured the mill, machinery, and fixtures for $1,500 in one company, and for

$2,000 in another; the losses being made payable by indorsements upon the policies to R., as her interest might appear. On July 9, 1880, the insured property was totally destroyed by fire. Before this time R. had no knowledge of the first insurance. The losses on the three insurances were adjusted by C. and the insurance companies at $4,298.03, as the true value of the property destroyed, so that the losses payable to R. were scaled from $3,500 (the face of the last two policies) to $2,442.20, which sum was paid to R. and applied on C.'s note. The loss under the first insurance was scaled and adjusted at $1,317.70, and that sum agreed to be paid C. accordingly. This was done July 19, 1880, and on the same day the certificate issued to C. on the first insurance, in lieu of a policy, was for value assigned to the plaintiffs. *Held*, that R. has an equitable lien on the proceeds of the first insurance, and is entitled to recover the same, to be applied on her note and mortgage.

Plaintiffs brought this action, in the district court for Hennepin county, against the Western Manufacturers' Mutual Insurance Company, to recover the amount due on a policy of insurance for $2,000, issued to one Robert Cochran, on a mill and machinery in this state. The mill was destroyed by fire, and the loss under this policy was adjusted at $1,317.70 on July 19, 1880. On the same day Cochran assigned all his rights under the policy to plaintiffs. Ruth C. Richardson, who had a mortgage upon the mill property, claiming to be entitled to this sum, was substituted as defendant in place of the insurance company.

The action was submitted to the court, *Young*, J., presiding, upon the complaint and answer, the allegations of which were admitted to be true, and the material portions of which are stated in the opinion. The court found for the plaintiffs, and ordered judgment accordingly. Defendant appeals from an order refusing a new trial.

BERRY, J. On December 16, 1879, Cochran, being owner of a piece of land in this state, insured a mill, machinery and fixtures therein against damage by fire, in the Western Manufacturers' Mutual Insurance Company, for $2,000. December 18, 1879, he borrowed of defendant $5,200, for which he gave his promissory note on five years, secured by a mortgage of the land mentioned, which was duly recorded December 22d. By the terms of the mortgage Cochran covenanted with Richardson that at all times during its continuance he would keep the buildings on the premises "unceasingly insured" for at least $5,200, payable in case of loss to Richardson, to the amount then secured by the mortgage. December 28, 1879, Cochran insured the mill, machinery, and fixtures for $1,500 in one company, and for $2,000 in another, and, by indorsement upon each of the two policies issued to him, the loss was made payable to Richardson, as her interest might appear. On July 9, 1880, while the three insurances were in force, the insured property was totally destroyed by fire. Before this Richardson had no knowledge of the first insurance. The loss was adjusted by Cochran and the three insurance companies at $4,298.03, as the true value of the property destroyed. The result was that the losses payable to Richardson were scaled from $3,500 (the face of the last two policies) to $2,442.20, and this sum was paid to her and applied on the note. The loss under the first insurance was scaled and adjusted at $1,317.70, and that sum agreed to be paid Cochran accordingly. This was done July 19, 1880, and on the same day the certificate which had been issued to Cochran by the Western Manufacturers' Mutual Insurance Company, in lieu of a policy, was for a valuable consideration duly assigned to the plaintiffs. They brought this action against the insurance company to recover the amount of the loss as adjusted at $1,317.70. Nothing having been paid upon Richardson's note and mortgage other than the sum of $2,442.20 before mentioned, and the whole debt having been declared due under a provision in the mortgage, there remains due and unpaid thereon something over $3,000. Richardson laying claim to the money ($1,317.70) realized from the first insurance, the company paid it into court, and Richardson was substituted as defendant in the company's place. The question is, who is entitled to this money—plaintiffs or Richardson?

It is well settled that, in the absence of an agreement by a mortgagor to insure for the benefit of his mortgagee, the latter has no right to any advantage whatever from an insurance upon the mortgaged property effected by the former for his own benefit. 1 Jones, Mortg. § 401; *Nichols* v. *Baxter*, 5 R. I. 491; *Plimpton* v. *Ins. Co.*, 43 Vt. 497; May, Ins. §§ 449, 456; *Carter* v. *Rockett, etc., Ins. Co.*, 8 Paige, 437.

It is equally well settled that an agreement by the mortgagor to insure for the benefit of his mortgagee gives the latter an equitable lien upon the proceeds of a policy taken out by the former and embraced in the agreement. And when the agreement is that the mortgagor shall procure insurance upon the mortgaged property, payable in case of loss to the mortgagee, and the mortgagor, or some one for him, procures insurance in the mortgagor's or a third person's name, without making it payable to the mortgagee, though this be done without the mortgagee's knowledge, or without any intent to perform the agreement, equity will treat the insurance as effected under the agreement, (unless this has been fulfilled in some other way,) and will give the mortgagee his equitable lien accordingly. This is upon the principle by which equity treats that as done which ought to have been done. That is to say, inasmuch as the insurance effected ought to have been made payable to the mortgagee, equity will give the mortgagee the same benefit from it as if it had been. In support of these general propositions we refer to *Thomas* v. *Vonkapff*, 6 Gill & J. 372; *Carter* v. *Rockett, etc., Ins. Co.*, and *Nichols* v. *Baxter, supra; Wheeler* v. *Ins. Co.*, 101 U. S. 439; *Cromwell* v. *Brooklyn Fire Ins. Co.*, 44 N

Y. 42; *Miller* v. *Aldrich*, 31 Mich. 408; 1 Story, Eq. Jur. § 64*g*; 2 Am. Lead. Cas. (5th Ed.) 832-4; *In re Sands Ale Brewing Co.*, 3 Biss. 175.

In the cases cited (with the exception of *Nichols* v. *Baxter*) the insurance was effected *after* the agreement to insure. In *Nichols* v. *Baxter* it would seem that the court thought this made no difference, though the opinion alludes (somewhat as a makeweight, as it occurs to us) to the fact, which appeared by inference only, that the insurance in that case, though effected *before* the agreement to insure, was understood by the parties to be embraced in it. We, however, can see no reason why the same rule should not be applicable to insurance already subsisting when the agreement to insure is made, as to that subsequently obtained, unless this result is affirmatively excluded by the facts of the case. Such subsisting insurance can be made payable to the mortgagee, or assigned to him, so as to satisfy the agreement. Where the agreement is, as in the case at bar, "*to keep*" the premises insured, it is entirely consistent with its letter as well as its spirit to hold that it embraces prior as well as subsequent insurance. And where, as in the present instance, the value of the insured property is such that subsequent insurance, sufficient to satisfy the agreement, cannot be obtained so long as the prior insurance stands, this is an equitable circumstance entitled to great weight upon the question whether the prior insurance ought to be held to be covered by the agreement. This equitable circumstance is much enhanced when the effect of the prior insurance is, as in this case, to scale and reduce the subsequent insurance procured and made payable to the mortgagee under the agreement.

In such a state of facts, to permit the mortgagor to withhold the prior insurance from the mortgagee is to permit him to profit by his own wrong, at the expense of him whom he has wronged, and a violation of one of the first principles of law as well as of equity. The question is not what the mortgagor's *intention* was with reference to the prior insurance, but whether it was equitable that, in carrying out any intention, he should be permitted to withhold the benefits from the mortgagee, especially in view of the maxim that equity regards that as done which ought to have been done. *Cromwell* v. *Brooklyn Fire Ins. Co.*, *Wheeler* v. *Ins. Co.*, *Miller* v. *Aldrich*, and *In re Sands Ale Brewing Co.*, *supra*.

Applying these considerations to this case, we are of opinion that Richardson is clearly entitled to an equitable lien upon the proceeds of the first insurance, to be applied upon her note and mortgage. Cochran ought to have kept his covenant. He could have done this by procuring a third new policy, or by assigning the first insurance, or having it made payable to Richardson. As he did not do the former, he should have done the latter, and therefore Richardson is in equity entitled to stand in the same position as if he had done what he ought to have done.

*Stearns* v. *Quincy Ins. Co.*, 124 Mass. 61, relied upon by the plaintiffs, is not a case presenting the precise question whether an insurance effected before an agreement to insure is to be regarded as embraced in such agreement, so as to give a mortgagee an equitable lien on the proceeds. But the principle there enunciated, and which appears to be supported by other decisions of that state, is that the mortgagee cannot have the lien unless the insurance was obtained by the mortgagor as his agent, or with *intent* to perform an agreement to insure. If this was to be regarded as the correct rule, it would seem to be decisive in the plaintiffs' favor. But it is against the weight and current of authority, and, as it seems to us, inequitable, and therefore we do not follow it.

Another question was discussed upon the argument, viz., whether the covenant to insure ran with the land, so that the record of the mortgage was constructive notice to the plaintiff and to all others of Richardson's (the mortgagee's) equities. We do not deem it at all necessary to consider this question. The mortgagor's assignment of his claim under the certificate after the loss was an assignment of a debt,—a mere chose in action,—which the plaintiffs took subject to all defenses and equities against him. *Archer* v. *Merchants' & M. Ins. Co.*, 43 Mo. 434; *Wilson* v. *Hill*, 3 Met. 66; *Brichta* v. *N. Y. Lafayette Ins. Co.*, 2 Hall, (N. Y.) 372; *Mellen* v. *Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Greene* v. *Warnick*, 64 N. Y. 220; May, Ins. § 386. From all this it follows that, in our opinion, the defendant is entitled to the proceeds of the first insurance paid into the court, instead of the plaintiffs, as found by the court below.

There being no dispute as to the correctness of the findings of fact, the case is remanded, with directions to the district court to render judgment for the defendant accordingly. Though there is no formal reversal of the order denying a new trial, the defendant is entitled to costs, as of course.

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(5 Kan. 615.)

## COM'RS DOUGLAS CO. v. UNION PAC. RY. CO., E. D.

(*Supreme Court of Kansas.* April, 1870.)

1. As long as the title to land lying within an Indian reserve remains in the United States, or in the Indians, or in both, the land is not taxable by the state.

2. A mere contingent, conditional, and inchoate equity, obtained by a railway company in such lands, but which does not amount to a title, either legal or equitable, does not so divest the United States of their title to the land as to subject the same to taxation.

3. Under a conditional purchase of said land by a railway company when by the terms of the contract of purchase no patent is to be issued for the

land until all the conditions of the purchase are fulfilled, and if any one of the conditions of the purchase is not fulfilled, the railway company are to forfeit all their right, title, and interest in and to said land, and the same is to be sold again to other parties, and when it appears from the nature of the contract and the character of the parties that *time* is an essential ingredient of the contract, no title, legal or equitable, passes to the railway company, until they fulfill every condition of their contract.

4. The laws and treaties of the United States, and not the laws of the state, must govern in the primary disposal of the soil by the United States.

Error from Douglas district court.

This action was brought by the railroad company to restrain the collection of taxes, levied for the years 1866 and 1867, on a quarter section of the 100,000 acres of land specified in the treaties with the Delaware tribe of Indians of May 30, 1860, and of July 2, 1861. 12 St. at Large, 1177. The patent granted, pursuant to the provisions of these treaties and the amendments, was not issued by the government until 1868. In the defense it was sought to be shown that although the legal title to the land did not pass until that time, yet that the railroad company held such an equitable title thereto as to make it liable for the taxes named; and this claim was based upon the contract found in the treaty, the Pacific railroad bills and the acts of the parties thereunder. The record shows that it was a fact agreed upon that the purchase money for the land had not been paid in 1867; that $250,000, the balance in full of the bonds issued, was not paid until February 11, 1868, but that the interest had been fully paid when due, and that it was further agreed that more than 25 miles of the road from Leavenworth westward had been completed and equipped in A. D. 1866.

VALENTINE, J. The only question in this case which counsel desire to raise, or to have decided, is whether the N. W. ¼ of section No. 29, township No. 12, range No. 20, in Douglas county, was subject to taxation for the years 1866 and 1867. This depends upon the question whether, at the time the land was assessed, the title to the same had passed from the Indians and the government of the United States to the Union Pacific Railway Company. If the title had passed, so that the land belonged to the railway company, it was taxable; but if the title had not so passed—if the land still belonged to the Indians or to the United States, or to both—it was not taxable. As the patent from the United States to the railway company had not been issued until the year 1868, it will hardly be contended that the legal title had passed. It is contended, however, that the equitable title had passed; that in equity the railway company were the real owners of the land, and therefore that the land was taxable. We suppose it will be conceded, even by the defendants in error, that if the equitable title had passed to the railway company, if their title was perfect, except that the company had received no patent, which is only the legal evidence of title, the land was taxable. We are of the opinion that no title, legal or equitable, had passed. It is true that the railway company had some equities in the land, but they were mere contingent, conditional, and inchoate equities that did not amount to a title. It is true that the company had made a conditional purchase of this land, but they were not to receive the patent therefor until all the conditions of the purchase were fulfilled; and if any one of the conditions were violated; if the company failed to complete and equip twenty-five miles of their railroad from Leavenworth westwardly within five years; if they failed to complete and equip the whole of their railroad through the Delaware reserve within eight years; if they failed to pay the interest annually or the purchase money, secured by bonds, within thirty days after the same became due, or if they failed to pay the principal of said bonds at the time it should become due, they were to forfeit all their right, title, and interest in and to said land, and it was then to be sold to other parties. It will be perceived from the very nature of this contract, and from the character of the parties to the same, that *time* was an essential ingredient of the contract. The contract was purely executory, and it was not intended that the government should be bound to execute its part of the contract by parting with any portion of its land, unless the railroad company should fulfill every portion of its part of the contract first, and strictly within the time stipulated. It was not intended to have any lawsuits over the matter. The railroad company could not sue the government or the Indians, and it was not intended that the government or the Indians should, under any circumstances, be under the necessity of suing the railroad company. The government and the Indians chose rather to retain every portion of their title to said lands and thereby keep their remedy within their own hands.

In equity there is a maxim that equity will consider as done that which ought to be done, and that it will look upon things agreed to be done as actually performed. As an application of this maxim equity generally considers that when land is sold on credit, and the deed is to be made when the purchase money is paid, that the land at the time the sale is made becomes the vendee's, and the purchase money the vendor's; that the vendor becomes at once the trustee of the vendee with respect to the land, and the vendee the trustee of the vendor with respect to the purchase money. But this maxim never applies where *time* is of the essence of the contract, and where the land is subject to absolute forfeiture on failure of some condition of the sale being performed; for there is no necessity in such a case for courts of equity to resort to any such fiction, and equity never looks upon a thing as done which ought not to be done, nor in favor of any party, except one that has a

right to pray that it may be done. In such a case no title, legal or equitable, passes until every condition of the sale is performed; and if such condition is not performed at the exact time that it should be performed, no title ever passes. Benedict v. Lynch, 1 Johns. Ch. 370; Wells v. Smith, 7 Paige, Ch. 22. The legal title to land never passes until the legal evidence of such title is executed, and the equitable title probably never passes until everything has been done so that the land cannot be forfeited; so that the person claiming to hold the equitable title could, even after failure on his part, still tender performance within a reasonable time, if he should so choose, and compel the conveyance of the legal title by a suit in equity if the adverse party be an individual, or by a writ of *mandamus* against the officers of the government if the government be the adverse party.

In this case the conditions upon which the land was sold had not all been performed when the land was assessed. In 1866 and 1867 the purchase money had not been paid, and therefore the patent had not been issued. Hence, in 1866 and 1867, we think the railroad company had no *title* to the land, legal or equitable. It is undoubtedly true, when the parties so agree, that title, both legal and equitable, may pass before the purchase money or any part of it is paid; but it can hardly be supposed that such title will pass against the consent of the parties in violation of their contract, and in violation of equity and good conscience.

On the second day of July, 1861, Thomas Ewing, Jr., agent for the Leavenworth, Pawnee & Western Railroad Company, (since changed to Union Pacific—now Kansas Pacific Railway Company,) executed an instrument in writing called a mortgage. Now, whatever this instrument may be called, it is absolutely ridiculous to suppose it has the attributes of a Kansas statutory mortgage. If it is such a mortgage, the railroad company, as mortgagor, possessed the entire title to the land, and the United States, as mortgagee, had nothing but a lien on the same—a mere security for the debt. After condition broken, the United States could not repossess themselves of the land, as provided in the treaty, and sell it as though no contract had ever been made with the railroad company, but they must commence an action in the district court of the state as provided in our statutes, obtain a judgment against the railway company, and have the land appraised and sold at sheriff's sale to satisfy said debt; and if the United States should not commence such action within three years after the cause of action accrued, they would be forever barred by our statute of limitations from commencing any action, or from ever setting up any claim or title to the land by virtue of the mortgage or otherwise. This doctrine seems to be too preposterous to be seriously considered. Under it the state law becomes the paramount law,—the supreme law of the land,—and the laws and treaties of the United States must yield thereto. But see sub. 2, § 1, art. 6, U. S. Const. The state of Kansas has the paramount right to control the authority of the United States with regard to making "regulations respecting the Indians, their lands, property, or other rights, by treaty, law, or otherwise," (but see Act of Admission, latter part of section 1;) and the state also has the right to "interfere with the primary disposal of the soil by the United States," and to give the land of the United States to a railroad company against the will of the United States, against their laws, and against the treaty made with the Indians. But see Act of Admission, sub. 5, § 3, and joint resolution of the legislature of Kansas, Comp. Laws 1862, p. 84. This case in some respects is similar to the case of State ex rel. Parker v. Winsor, 5 Kan. 362, decided at this term, and for additional arguments and additional authorities we would refer to that case.

The judgment of the court below is affirmed.

SAFFORD, J., concurring.

(See, also, 1 Pom. Eq. Jur. p. 393; Story, Eq. Jur. § 64*g*; Snell, Eq. p. 37; 2 Spence, Eq. Jur. p. 253; Adams, Eq. p. 135; Frederick v. Frederick, 1 P. Wms. 710; Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Gardiner v. Gerrish, 23 Me. 46; Peter v. Beverly, 10 Pet. 534-563; Daggett v. Rankin, 31 Cal. 321-326; Atwood v. Vincent, 17 Conn. 575; Felch v. Hooper, 119 Mass. 52.)

## EQUITABLE PROPERTY, GROWING OUT OF THE APPLICATION OF THIS MAXIM.

### 1. Originating from a contract to sell land.

(22 N. J. Eq. 531.)

HAUGHWOUT v. MURPHY.

(*Court of Errors and Appeals of New Jersey.* 1871.)

Where a contract for the sale of land has been executed and delivered, the vendee becomes the equitable owner of the land, and the vendor the equitable owner of the purchase price.

The opinion of the court was delivered by DEPUE, J.

The bill of complaint filed in this cause, after setting out the proceedings in the suit in chancery between Haughwout and Boisaubin, charges that the deed of conveyance from Boisaubin to Murphy, though bearing date on the 7th of August, 1865, was not actually delivered until the 5th day of October of that year, and after the filing of the bill of complaint by Haughwout against Boisaubin, and after the filing of notice of the pendency of that suit in the clerk's office of the county of Morris. It further charges that the said Murphy had actual knowledge of the contract of purchase made by Haughwout with Boisaubin, and of the intention of Haughwout to commence suit for specific performance, long before the delivery of his deed and the payment of any part of the consideration money therefor; and that the defendant accepted the said conveyance, and paid the purchase money therefor, with actual knowledge of the existence of the complainants' contract, and of the pendency of the suit for the specific performance thereof.

The prayer of the bill is that the title of the complainants to the said three lots may be ratified and established, and declared to be good and valid as against the claim of title made to the same by said Murphy, and be declared paramount thereto; and that the claim of title to the said lots by the said Murphy, under his deed of conveyance from Boisaubin, be declared invalid and of no effect against the title of the complainants, and that the defendant may be directed to release and convey to the complainants; and that the complainants may have such other and further relief, &c.

A suit in chancery, duly prosecuted in good faith, and followed by a decree, is constructive notice to every person who acquires from a defendant, *pendente lite*, an interest in the subject matter of the litigation, of the legal and equitable rights of the complainant as charged in the bill and established by the decree.

This effect of a successful litigation in subordinating the title of a purchaser pending a litigation, to the rights of the complainant as established in the suit, is not derived from legislation. It is a doctrine of courts of equity, of ancient origin, and rests not upon the principles of the court with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit. *Bellamy* v. *Sabine*, 1 *DeG. & J.* 566; *Metcalfe* v. *Pulvertoft*, 2 *V. & B.* 205; *Walden* v. *Bodleys' Heirs*, 9 *How.* (*U. S.*) 49; *Murray* v. *Lylburn*, 2 *Johns. Ch.* 441. Such a purchaser need not be made a party, and will be bound by the decree which shall be made. 1 *Story's Eq. Jur.* § 406; *Story's Eq. Pl.* §§ 106, 351; *Bishop of Winchester* v. *Paine*, 11 *Ves.* 196.

Before any statutory provision was made requiring notice of the pendency of the suit to be filed in order to charge a subsequent purchaser from the defendant with notice of the litigation, it became the established practice that subpœna served and bill filed were necessary before the suit was considered as commenced, so as to make its pendency constructive notice to persons deriving title from the parties, and to give the decree a conclusive effect against such persons. 1 *Vern.* 318; 2 *Maddock's Ch. Prac.* 325; 2 *Sug. V. & P.* 280; *Hill on Trustees* *511; *Hayden* v. *Bucklin*, 9 *Paige*, 512; *Dunn's Lessee* v. *Games*, 1 *McLean*, 321; *S. C.*, 14 *Peters*, 322, 333. An assignee who takes an assignment from the defendant after bill filed, but before subpœna served, is a necessary party. *Powell* v. *Wright*, 7 *Beav.* 444. By the fifty-seventh section of the Chancery Practice Act, (the provisions of which are similar to the New York act of 1834, and to the English Statute of 2 *Vic., ch.* 11, *sec.* 7,) another requisite is superadded in order that the proceedings in the suit shall affect a bona fide purchaser or mortgagee; a written notice of the pendency of the suit must be filed in the clerk's office of the county in which the lands to be affected lie. *Nix. Dig. p.* 102.* This section is expressed in negative terms, and has not changed the former practice except in prescribing that notice of the *lis pendens* shall be filed before a bona fide purchaser or mort-

*Rev., p. 114, sec. 57.

gagee shall be chargeable with notice of the pendency of the suit, notwithstanding the bill has been filed and the subpœna served.

But the defendant was not a purchaser *pendente lite*. He acquired title by a deed which bears date on the 7th day of August, 1865, and was acknowledged on the next day. The defendant testifies that it was delivered on the 7th of August. Boisaubin's testimony is that it was delivered on the 7th or 8th. From the date of the acknowledgment of the mortgage, it is probable that it was not finally delivered before the 19th. The proof, however, is full and clear that it was executed and delivered to Murphy before the bill was filed in the case of *Houghwout* v *Boisaubin*.* The commencement of a suit in chancery is constructive notice of the pendency of such suit only as against persons who have acquired some title to or interest in the property involved in the litigation, under the defendant, after the suit is commenced. *Stuyvesant* v. *Hall*, 2 *Barb. Ch.* 151; *Hopkins* v. *McLaren*, 4 *Cow.* 667; *Parks* v. *Jackson*, 11 *Wend.* 442. A person whose interest existed at the commencement of the suit is a necessary party, and will not be bound by the proceedings unless he be made a party to the suit. *Ensworth* v. *Lambert*, 4 *Johns. Ch.* 605.

The complainants' right to relief on the ground that the defendant was a purchaser from Boisaubin *pendente lite* having failed, it must be considered whether, in the other aspect of the case, he will be entitled to relief. In this aspect the bill is to be taken to have been filed for the execution of the trust arising from the prior contract between Haughwout and Boisaubin for the purchase of the lands, by the conveyance to the complainant, by Murphy, of the legal title which he acquired by his deed. In this aspect of the case, the bill is a bill for specific performance.

In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. *Crawford* v. *Bertholf*, *Saxton*, 460; *Hoagland* v. *Latourette*, 1 *Green's Ch.* 254; *Huffman* v. *Hummer*, 2 *C. E. Green*, 264; *King* v. *Ruckman*, 6 *C. E. Green*, 599. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money. 1 *Story's Eq. Jur.* § 789; 2 *Ibid.*, § 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom, by the first contract, he became trustee, and therefore liable to account. 2 *Spence's Eq. Jur.* 310. Or the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser. *Hoagland* v. *Latourette*, 1 *Green's Ch.* 254; *Downing* v. *Risley*, 2 *McCarter*, 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was. 1 *Eq. Cas. Abr.* 384; *Story* v. *Lord Windsor*, 2 *Atk.* 631. The *cestui que trust* may follow the trust property in the hands of the purchaser, or may resort to the purchase money as a substituted fund. *Murray* v. *Ballou*, 1 *Johns. Ch.* 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of lands mainly depends.

The defendant insists that he holds the lands discharged of any trust in favor of Haughwout or the complainants, by reason of his being a bona fide purchaser for a valuable consideration, without notice.

The proof is, that at the time of the delivery of the deed, $400 of the consideration money was paid, and the balance secured by mortgage. Conceding that the $400 was actually paid before Murphy had notice of Haughwout's claim, the defence of a bona fide purchase is not supported. Before the mortgage became due, Murphy had actual notice of the existence and nature of Haughwout's claim.

The defence of a bona fide purchase may be made by plea, in bar of discovery and relief, or by answer, in bar of relief only. If made by plea, the payment of the whole of the consideration money must be averred. An averment that part was paid and the balance secured by mortgage, will not be sufficient. *Wood* v. *Mann*, 1 *Sumner*, 506. Proof of the payment of the whole purchase money is essential to the defence, whether it be made by plea or answer. *Jewett* v. *Palmer*, 7 *Johns. Ch.* 65; *Molony* v. *Kernan*, 2 *Drury & Warren*, 31; *Losey* v. *Simpson*, 3 *Stockt.* 246. Notice before actual payment of all the purchase money, although it be secured and the conveyance executed, or before the execution of the conveyance, notwithstanding the money is paid, is equivalent to notice before the contract. 2 *Sug. V. & P.* 533 (1037); *Hill on Trustees* 165. If the defendant has paid part only, he will be protected *pro tanto* only. 1 *Story's Eq. Jur.*, § 64 *c.*; *Story's Eq. Pl.*, § 604 *a.*

What the measure of relief shall be in cases where the deed has been executed and delivered and part of the purchase money paid before notice of the previous contract to sell to another, was elaborately discussed by the counsel of the appellants. The Chancellor held, upon the authority of *Flagg* v. *Mann*, 2 *Sumner* 487, that a contract of purchase, executed by delivery of the deed and payment of part of the purchase money without notice

*3 *C. E. Green*, 315.

of the previous contract, gave the purchaser a right to hold the land, and that the equity of the person with whom the previous contract was made, was merely to have the unpaid purchase money.

The law of the English courts is, that until the defence of a bona fide purchase is perfected by the delivery of the deed of conveyance, and the payment of the entire consideration money, such purchaser is without any protection as against the estate of the equitable owner under a prior contract, even though he contracted to purchase, and accepted his deed and paid part of the purchase money in good faith; his only remedy being against his vendor to recover back what he has paid on a consideration which has failed. In some of the American courts this doctrine has been qualified to the extent of enforcing specific performance of the prior contract, on condition that the purchaser shall be indemnified for the purchase money paid, and also for permanent improvements put upon the property before notice, on the principle that he who asks equity must do equity. The cases are collected in 2 *Lead. Cas. in Eq.* 1; notes to *Basset* v. *Nosworthy*.

The doctrine of the English courts is necessary to give effect to the principle that in equity, immediately on the contract to purchase, an equitable estate arises in the vendee, the legal estate remaining in the vendor for his benefit. Qualified by the obligation to make compensation to any subsequent bona fide purchaser, who has paid part only of the consideration money, for all disbursements made before notice, the rule is every way consonant with correct principles. Such indemnity is protection *pro tanto*.

But whatever the nature of the relief may be in cases where the naked question of the acceptance of a deed and payment of part of the consideration before notice is presented, the relief indicated by the Chancellor is the only relief the complainants are entitled to under the circumstances of this case. The rule of law which deprives a subsequent purchaser who has contracted for and accepted a conveyance, and paid part of the purchase money in good faith, of the fruits of his purchase without indemnity, is exceedingly harsh, and often oppressive in its application. Mitigated by the obligation to make indemnity for payments and expenditures before actual notice, its operation is nevertheless frequently inequitable. A party who asks the enforcement of a rule of this nature against another who is innocent of actual fraud, must seek his remedy promptly. He may lose his right to specific relief against the lands by laches, and be remitted to the unpaid purchase money as the only relief which will be equitable. In cases where the prayer is for the specific performance of a contract between the immediate parties to the suit, delay in filing the bill is often of itself a bar to relief. *Merritt* v. *Brown*, 6 *C. E. Green*. 401.

The agreement between Haughwout and Boisaubin was made on the 24th of September, 1863. In February, 1864, Haughwout gave Boisaubin notice of his election to take the property under the agreement. After this notice was given, Boisaubin laid the property out in lots and publicly offered them for sale. Murphy's deed for the three lots of which he became the purchaser, was executed and delivered in August, 1865. The bill in the suit of *Haughwout* v. *Boisaubin*, was filed the last day in the same month. The solicitor who appeared for Haughwout in that suit, had notice of the existence of Murphy's deed within a few days after his bill was filed. Boisaubin, in his answer, which was filed on the 3d of November, 1865, specifically sets out the fact of the conveyance to Murphy and the circumstances connected therewith. Murphy was himself examined as a witness on the 5th of April, 1866, and testified in relation to the conveyance to him. Haughwout must be charged with notice as early as April, 1866, that Murphy intended to assert his right to the land. The bill in this case was not filed until the 4th of April, 1868. After this long delay it would be inequitable to enforce specific performance against the defendant. The fact that there were delays in the prosecution of that suit to final decree, which were unavoidable, ought not to prejudice Murphy. He should have been made a party to that suit.

Besides that, the bond and mortgage which were given by Murphy to Boisaubin for the unpaid purchase money, were assigned by Boisaubin to one Geoffrey, on the 16th of April, 1866, and by Geoffrey further assigned to William Davidson, on the 2d of July of the same year, and notice of such assignment given to Murphy by the solicitor of Davidson. The money due on the mortgage was paid at its maturity by Murphy to Davidson's solicitor. That Davidson, in the transaction, was acting for Haughwout, and that the money wherewith this assignment was procured was paid by Haughwout, and that the proceeds when collected were realized by him, are indisputable.

That the assignment was made by Geoffrey to Davidson, as collateral security, will not affect the case. When Murphy received notice of the prior equitable title of Haughwout, he was entitled to have the security he had given for the unpaid purchase money surrendered. *Tourville* v *Naish*, 3 *P. Wms.* 307. The subsequent assignments were taken and the money received, with full notice of all the circumstances. The money received on the mortgage, Haughwout still retains. It is no answer to say that in decreeing specific performance Murphy may have the money refunded to him. Haughwout might have insisted upon having the land itself, or at his option, pursued the proceeds of the sale. He cannot have both. By accepting a security given for the purchase money, he

is deemed to have affirmed the sale so far as respects the purchaser. *Murray* v. *Lylburn*, 2 *Johns. Ch.* 441; 2 *Story's Eq. Jur.* § 1262; *Scott* v. *Gamble*, 1 *Stockt.* 218.

The complainants are not entitled to relief. The decree of the Chancellor is affirmed, with costs.

The whole court concurred.

(See, also, 1 Pom. Eq. Jur. § 368; Story, Eq. Jur. §§ 789, 790, 1212, 1213; Farrar v. Winterton, 5 Beav. 1-8; Crawford v. Bertholf, 1 N. J. Eq. 460; Worrall v. Munn, 38 N. Y. 139; Green v. Smith, 1 Atk. 572, 573; Trelawney v. Booth, 2 Atk. 307; Pollexfen v. Moore, 3 Atk. 273; Taylor v. Benham, 5 How. 234; Champion v. Brown, 6 Johns. Ch. 403; Richter v. Selin, 8 Serg. & R. 425; Mackreth v. Symmons, 15 Ves. 329, 336.)

## 2. Trust property.

(113 Mass. 92.)

### McDonough v. O'Niel.

(*Supreme Judicial Court of Massachusetts.* 1873.)

Where a person buys land, taking a conveyance to himself, but pays for the same with the money of a third person, there arises a trust in favor of the person whose money has thus been employed.

Gray, C. J. The decision of this case depends upon the application to the evidence of well settled rules of equity jurisprudence.

Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the statute of frauds. It is sufficient if the purchase money was lent to him by the grantee, provided the loan is clearly proved. And the grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase money, by reason of such loan or otherwise, was the money of the alleged *cestui que trust*. *Kendall* v. *Mann*, 11 Allen, 15. *Blodgett* v. *Hildreth*, 103 Mass. 484. *Jackson* v. *Stevens*, 108 Mass. 94. In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly. *Campbell* v. *Dearborn*, 109 Mass. 130. The findings of a master in matters of fact are not to be reviewed by the court, unless clearly shown to be erroneous. *Dean* v. *Emerson*, 102 Mass. 480. And in equity, as at law, the omission of a party to testify in control or explanation of testimony given by others in his presence is a proper subject of consideration. *Whitney* v. *Bayley*, 4 Allen, 173.

It appears and is not controverted that the deed was made by Godfrey to the defendant, whose wife was the testator's sister; that the purchase money was $3000, of which the testator furnished $300 of his own money, and $200 borrowed by him of Mrs. McGovern, upon a note signed by himself and the defendant; the defendant furnished $600 of his own money, and $400 borrowed of Dolan upon the defendant's note; and for the remaining $1500 the defendant gave his own note, secured by mortgage on the premises, to Clements, who held a previous mortgage for a like amount, and who testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterwards did, in discharge of the old one. The will recites that the defendant held a deed of certain real estate in trust for the testator's benefit, and had paid certain sums of money on his account, and directs that all such sums of money, with interest, should be paid back to him, and he should then convey the property in fee to the testator's wife. The attorney who drew the will certifies that he read this part of it in the testator's presence, and before its execution, to the defendant, and asked him if it was right, and he said it was, and upon being asked what claims he had against the place, answered $600, besides $100 for repairs and $44.08 for taxes, and that he had received from the testator the whole amount with interest of the note to Dolan, except $80, and that the testator had paid the note to Mrs. McGovern. The other material testimony may be taken as stated on the defendant's brief, namely, that the defendant repeatedly "admitted that he bought the place for John B. McDonough and that he meant to assist or help him;" that "the defendant said McDonough wanted him to buy the place for him," "that he had always wanted John to take the deed, but he had not paid up;" and "that he was ready to fix up the place when McDonough was ready to pay up." The master also reports that the defendant was present at the hearing before him, but did not offer to testify.

From this evidence the master, who heard all the witnesses, was warranted in finding as matter of fact that the money paid by the defendant for the land was lent by him to the plaintiff for the purpose, and that thus the whole purchase money was the plaintiff's money. Upon examination of the whole evidence, we see no sufficient cause for reversing the conclusion of the master; and taking the facts as found by him, the inference of law follows that there was a resulting trust in favor of the testator, and that there must be a *Decree for the plaintiff.*

(See, also, 1 Pom. Eq. Jur. §§ 106, 146, 374; Story, Eq. Jur. § 1201; Adams, Eq. pp. 26, 33, note; Snell, Eq. p. 45; Thompson v. Thompson, 16 Wis. 94; Dodd v. Wakeman, 26 N. J. Eq. 484; Hunt v. Roberts, 40 Me. 187; Nelson v. Worrall, 20 Iowa, 469; Hidden v. Jordan, 21 Cal. 93.)

(As to effect of statute of frauds, see Ryan v. Dox, 34 N. Y. 307; Laing v. McKee, 13 Mich. 124.)

(See post, "Equitable Estates.")

## 3. Assignment of chose in action.

(4 Mass. 508.)

DIX v COBB.

(*Supreme Judicial Court of Massachusetts.* 1808.)

A debt evidenced by a book account is assignable in equity.

*PARSONS, C. J.* Has *Whitney* by his answer to the plaintiffs' interrogatory discharged himself? is the question submitted to the court.

This answer admits that he formerly owed *Cobb* about fifteen dollars on account for merchandise purchased; that when he was sued he had no knowledge that *Cobb* had assigned this debt, but that he has since been informed by the attorney of *Higginson* and others that before the suit this debt had been assigned to them, and was forbidden to pay it to *Cobb*, but was requested to pay it to the assignees. A copy of the assignment, under the seal of *Cobb*, the trustee annexes, and makes it a part of his answer.

The plaintiff insists that this debt is not protected from his attachment by the assignment for several reasons.—One is the nature of the debt, resting for its evidence on an account-book and on a note or bond, is such that it is incapable of assignment.—Another reason is, that he made the attachment before the trustee had notice, and also that the trustee, not being privy to the assignment, it may without his knowledge be fraudulent as to the creditors of the assignor.

After full consideration we are satisfied that *Whitney* has discharged himself by his answer. The debt is a *chose in action*, and like other *choses in action*, except negotiable securities, is not assignable at law; but all *choses in action* may be assigned in equity, and the assignee has an equitable right, which he may enforce at law in the name of the assignor, whose release or bankruptcy shall not defeat it.

In the case of *Winch* vs. *Keeley* [1 *Term R.* 619.] the debtor had assigned, as in this case, a debt due for goods sold, and he afterwards becoming bankrupt, it was determined that the assignment should protect the debt against the assignees under the commission of bankruptcy. If the debtor has paid the debt to the assignor without notice of the assignment, he shall be discharged; for he shall not suffer by the neglect of the assignee.

The doctrine which establishes the assignability in equity of *choses in action*, arises from the public utility of increasing the quantity of transferable property, in aid of commerce and of private credit.

The assignment in this case *may* be fraudulent, but on its face it appears to be regular, and for a valuable consideration; and we cannot presume fraud.

When an attaching creditor has reason to believe the assignment fraudulent, of which he has knowledge before the suit, he may sue the assignee as a trustee, and compel him to a discovery on oath.—Or if he has not notice seasonably to sue the assignee as a trustee, he may, after he has recovered judgment against the principal, sue an action of debt on that judgment, and summon the assignee as a trustee in that action, and compel him to a discovery on oath upon the penalty of paying the debt, and if on this discovery the assignment should be fraudulent, the assignee would be adjudged a trustee so far as he had derived any benefit from it. And it is much better to leave the attaching creditor to this remedy, than to presume an assignment fraudulent, or to defeat the assignability of *choses in action*.

Although the trustee in this case had no notice of the assignment, until after he was sued as a trustee, yet immediately on the assignment, the equitable interest in the debt, as between the parties to it, immediately passed to the assignee. And if the assignor had afterwards received the debt, he would be obliged to pay it over to the assignee. But an attaching creditor cannot stand on a better footing than his debtor (if the assignment be not fraudulent as to creditors) and if he attaches any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And consequently if his debtor have no equitable interest in a *chose in action*, the creditor cannot acquire any by his attachment.

Therefore the want of notice in the trustee will not defeat the assignee's interest in this debt in favour of an attaching creditor. This point was decided in *Suffolk* about eight years ago in the case of *Wakefield* vs. *Martin and trustees*.[2]

*Judgment that* Whitney *be discharged as trustee.*

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[2] 3 Mass. 558.

(See, also, 3 Pom. Eq. Jur. § 1270; Story, Eq. Jur. § 1039; Adams, Eq. pp. 53, 54; Snell, Eq. p. 91; Devlin v. Mayor, 63 N. Y. 8; Hinkle v. Wanzer, 17 How. 353; Row v. Dawson, 1 Ves. Sr. 331; Wright v. Wright, Id. 409; Squib v. Wyn, 1 P. Wms. 378-381.)

(Not assignable at common law. Lampet's Case, 10 Coke, 46*b*, 48*a*.)

(The equitable interests of the assignee were protected later by common-law courts by allowing him to maintain an action in the name of the assignor. Master v. Miller, 4 Term R. 320, 340, 341; Edwards v. Parkhurst, 21 Vt. 472; Briggs v. Dorr, 19 Johns. 95; Johnson v. Bloodgood, 1 Johns. Cas. 51.)

## 4. Sale of property not yet in existence or afterwards to be acquired.

(91 Pa. St. 296.)

RUPLE v. BINDLEY

*(Supreme Court of Pennsylvania.* 1879.)

Demands which have no existence at the time of the contract may be assigned, and a court of equity will enforce the assignment when the demands are actually brought into existence.

Mr. Justice TRUNKEY delivered the opinion of the court, October 27th 1879.

The evidence was amply sufficient to warrant a jury in finding that Ruple contracted to build a flight of stairs for Bindley for $133, Bindley to first pay out of said sum $28.15 which Ruple owed to England & Bindley; that the order for $104.85 was given for the balance of the contract price, in consideration that Lewis would furnish Ruple with material and money to enable him to do the work, and they were so furnished; that Bindley had notice of the order about the time the work was commenced and before he had paid anything to Ruple; and that Bindley paid $82 to Boyd on an order given after said notice, and to Ruple the balance of the contract price. The jury were instructed that there was nothing in the evidence to justify the plaintiff's recovery. If it were material to the plaintiff's case that Bindley agreed to pay the order, on completion of the work, though he refused a written acceptance, the conflicting testimony on this question should have been submitted.

An assignment, for a valuable consideration, of demands having at the time no actual existence, but which rest in expectancy only, is valid in equity as an agreement, and takes effect as an assignment, when the demands intended to be assigned are subsequently brought into existence: Field *v.* City of New York, 6 N. Y. 179; East Lewisburg Lumber & Manuf. Co. *v.* Marsh, 91 Pa. St. 96. In Field *v.* City of New York, it was held that assignments of parts of a demand to different persons, to secure payments to them of specific sums, in succession, are good and will be enforced in equity. Whether such assignments are valid in Pennsylvania need not now be said; for the order covered the whole, after deducting the sum to be paid, by the terms of the contract, to England & Bindley.

The form is immaterial so that there be a clearly expressed intention of an immediate transfer of the right to the assignee. Where one was indebted to a number of persons and remitted a sum of money to B., with orders to give specific parts to certain creditors, it was held that B. became a trustee for those creditors, and that they, thereupon, acquired such an interest in the trust fund as could not be divested by an attachment against the debtor, though some of the creditors had no notice of the trust before the service of the attachment: Sharpless *v.* Welsh, 4 Dall. 279. An order to the drawer's attorney, to pay to W. the amount of a note on H. when collected, is an assignment of the fund, by the agreement of the parties, and cannot be revoked, even if the draft was not accepted by the drawee: Nesmith *v.* Drum, 8 W. & S. 9. In Caldwell *v.* Hartupee & Co., 20 P. F Smith 74, an order for part of a fund was held to be a valid equitable assignment. Caldwell was to receive money for use of Hartupee & Co., who were indebted to a firm of which Caldwell was a partner. Hartupee & Co. gave an order to Cuthbert for $1500, out of proceeds of the last note coming to them, which, on presentation, Caldwell refused to accept, saying, "Hartupee & Co. owed them money and he was going to apply it on their book account." At the time of said refusal Caldwell had in his hands only about $30, but afterwards received more than enough to pay the order. On the trial Caldwell's defence of set-off was rejected as to the amount of the order, and allowed for the balance in his hands.

The defendant seems to rely on Jermyn *v.* Moffitt, 25 P. F. Smith 400, where it was held that a transfer of "a debt to arise for wages not yet earned, against any person by whom the assignor may afterwards be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer." The soundness of this principle is unquestioned, and was strictly applicable to the facts of that case. Jermyn's name was not in the instrument; Leslie, the assignor, had no contract with him, was not then in his employ, and, consequently, there was neither a present nor expectant fund on which the assignment could attach. On the trial, the point that "an assignment can only be made of moneys due or owing, and not *in futuro* of moneys to be earned," was refused, with answer that "a party is competent to assign wages to come due if the vested rights of third parties are in nowise prejudiced thereby;" and this court said there was no error in that.

We are of the opinion that the order by Ruple to Lewis was an equitable assignment; and, in connection with the facts which the jury might well have found, had the evidence been submitted, the plaintiff was entitled to recover. For the present inquiry such facts must be considered as existing. The first, second, third and fifth assignments of error are sustained.

It may be presumed that if the case had been given to the jury, the matter contained in the fourth assignment would have been properly explained. This suit is not on the alleged promise of Bindley to pay Lewis, but on the contract assigned by Ruple.

Judgment reversed and *venire facias de novo* awarded.

(See, also, 3 Pom. Eq. Jur. § 1287; Field v. New York City, 6 N. Y. 179.)

(64 Pa. St. 366.)

## PHILADELPHIA, W. & B. R. CO. v. WOELPPER.

(*Supreme Court of Pennsylvania.* 1870.)

Where there is a contract of sale or a mortgage of property afterwards to be acquired, such as the tolls, income, and receipts of a railroad company, equity will enforce such contract whenever the property so covered is acquired.

The opinion of the court was delivered, March 10th 1870, by

SHARSWOOD, J.—By the Act of Assembly of February 12th 1856 (Pamph. L. 42) it was provided "that for the purpose of constructing and equipping the Philadelphia and Baltimore Central Railroad, chartered by the legislatures of Pennsylvania and Maryland, the said company is hereby authorized to borrow money to any amount not exceeding $1,500,000," * * * "and to issue their bonds therefor." * * * "and to secure the payment of the said bonds and their interest by executing and delivering to such trustee or trustees as they may select, a mortgage or mortgages of all or any part of their road, property, rights, liberties and franchises of the said company in the state of Pennsylvania."

In pursuance of this power the said company, on February 15th 1859, did execute and deliver to Ezra Bowen and George S. Fox, trustees, a mortgage of "all the road, property, rights, liberties, privileges, corporate franchises, incomes, tolls and receipts, now held or hereafter to be acquired in the state of Pennsylvania."

The first question which arises is, whether this mortgage is effectual to give a valid lien on the locomotive engines, passenger and other cars, furniture of stations, tools and materials for support and repair of the road, levied on by the sheriff of Chester county under a fieri facias issued upon a judgment obtained by the appellants in the Court of Common Pleas. These articles, or by far the greater part of them, were not in existence or acquired by the mortgagors at the date of the mortgage; but it is clear, and is reported as a fact by the master in the court below, that they were in actual use upon the railroad, and were required for the transaction of its business, and that the trains could not be run without them, and that although acquired since the execution of the mortgage, they are of the kind of articles which the company had at that time, and are essential to the full exercise of the franchises granted to the company, which were for the benefit of the public as well as for that of the corporators. It is not denied that the words of grant in the mortgage are sufficiently ample to cover all this property. But it is objected that no person, natural or artificial, can grant what he does not possess or own at the time of the grant. *Qui non habet, ille non dat.* Yet even at law this rule is not without some qualifications. A man may grant the future accretions or increase of any subject which he owns at the time of the grant, as all the wool which shall grow on his sheep for a term of years. Grantham *v.* Hawley, Hobart 132, was the case of a covenant by a lessor that a lessee of a term certain might take the corn that should be growing at the end of the term, and upon an issue whether it did of right belong to the lessee it was held to be a good grant. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant: Ass. 21 Henry 6. A parson may grant all the tithe wool that he shall have in such a year: 1 Plowd. 13 a. So, if a man grant *vesturam terræ*, the grantee shall have the corn, grass, underwood, sweepage and the like: 1 Inst. 4 b. It is indubitable that a mortgage of land will pass all structures or fixtures that may afterwards be erected upon it by the mortgagor. But it is not necessary to maintain that the rolling-stock and equipments of a railroad are part of its accretions and fixtures, so as to make the transfer good at law. It is unquestionably good in equity. Contingent estates and interests, though not assignable at law, are assignable in equity; and they may also be the subject of a contract, which, when made for valuable consideration, will be specifically enforced when the event happens: 2 Story's Eq. 1040 b. On the same principle equity originally took cognizance of assignments of choses in action, which were void at law, and when made for value carried them into execution by considering the assignment a declaration of trust by the assignor in favor of the assignee, compelling the assignor to allow his name to be used by the assignee in proceeding at law, and enjoining him from releasing or otherwise interfering with the equitable property vested by the assignment in the assignee: 2 Story 1039, 1040. It is a plain corollary from these principles that a court of equity will treat a mortgage of property to be subsequently acquired, whether it be real or personal, as a binding contract, which attaches to the thing when acquired. Equity considers that as actually done which a chancellor would decree to be done. If then, upon every acquisition of property within the description contained in the mortgage, a chancellor would decree the mortgagor to execute a mortgage of such subject, it will be considered as though it had been done, and that of every article of property as acquired there was an actual mortgage then executed. The authorities cited in the able report of the master below fully sustain this view, to which may be added Covey *v.* Pittsburg, Fort Wayne and Chicago Railroad Co., 3 Phila. Rep. 173, decided by our brother Agnew, when President Judge of the Court of Common Pleas of the 17th Judicial District.

But the principal contention here has been that the mortgage by this corporation, so far as it included subsequent acquisitions, was

*ultra vires*—beyond the power conferred upon them by the legislative grant. The act authorized them to mortgage all their property, a word of very large extent. Property (*proprietas*) is whatever is a man's own (*proprius*). His future acquisitions, though subject to a contingency, are his own, and if, as we have seen, they can be granted or assigned, they are his present property, valuable now to him because they can be enjoyed or used by anticipation. There is no refinement in this reasoning as applied to the construction of this statute. The legislature evidently intended it. Every law is to be interpreted according to its subject-matter. This act relates to a railroad and its usual necessary appurtenances. The words are, "road, property, rights, liberties and franchises," including the road and all its adjuncts. The very object of the loan, and of the mortgage to secure it, as expressed in the act, was "for the purpose of constructing and equipping the road." It evidently contemplated a condition of things in the future. The bare road, only then constructed in part, without any rolling-stock or equipments, would have been no security, or a very inadequate one. Had the road even been fully equipped at the date of the mortgage, can it be doubted that the legislature meant that it should comprise everything subsequently acquired to replace old and worn-out materials, and to maintain and keep up the equipment? No money would have been loaned on a security daily deteriorating, and which must eventually perish entirely. As was well said by our brother Agnew, in the case before referred to, "To build a railroad requires a vast capital beyond ordinary means, and to borrow it to carry into effect the objects of the incorporation demands all the security within the possible power of the corporation to give. By necessity and practice, the money of the creditor capitalist finishes and equips the road; and slender indeed would his security be which extends not beyond worn-out rails and rolling-stock, and equipments first in use, and these indeed not often in being at the time of the execution of the mortgage. In giving the power to borrow and pledge, it must be supposed the power was given to its fullest extent, in order to carry into effect the object of the incorporation." This construction does not conflict with Roberts' and Pyne's Appeal, 10 P. F. Smith 400. That was under the Act of January 11th 1867 (Pamph. L. 1372), which enabled "all iron and other manufacturing and mining corporations to borrow moneys and to secure the loans to be made to them by mortgage of their property." No special purpose is specified, and the subject-matter was not such as to call for or require any other than a strict construction. It was held, therefore, not to include chattel mortgages. "It is true," says the opinion, "railroad corporations have been allowed to do this, and other corporations in similar circumstances, when personal interests have been of such a permanent or fixed character, or so incapable of removal that no inconvenience would be felt in relaxing the general rule as to movables. But in this act the term property is so wholly unexplained by its context, that it may or may not refer to chattels, and leaves the mind to hesitate and doubt whether the legislature meant more than the property accustomed to be mortgaged under the laws of the state, and for which provision was made for notice by recording, and remedy by scire facias."

These conclusions sustain the decree made in the court below, and dispense with the necessity of considering the other point made as to the right of the sheriff to levy upon the articles contained in the inventory independently of the mortgage.

Decree affirmed, and appeal dismissed at the costs of the appellants.

(See, also, 3 Pom. Eq. Jur. §§ 1288–1291; Story, Eq. Jur. § 1055; Mitchell v. Winslow, 2 Story, 630; Langton v. Horton, 1 Hare, 549, 556, 557; In re Ship Warre, 8 Price, 269, note; Douglas v. Russell, 4 Sim. 524; Leslie v. Guthrie, 1 Bing. N. C. 697–708; Baxter v. Bush, 29 Vt. 465, 469; Page v. Gardner, 20 Mo. 507; Williams v. Winsor, 12 R. I. 9.)

(As to rights of attaching creditors and the equitable owner, see 2 De Gex, F. & J. 596, and note; Jones v. Richardson, 10 Metc., Mass., 481; Head v. Goodwin, 37 Me. 182.)

(But see Holroyd v. Marshall, 10 H. L. Cas. 216, which holds that the right of the equitable owner takes precedence of the attaching creditor.)

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## 5. Sale of possibility.

(40 Pa. St. 37.)

BAYLER v. COMMONWEALTH.

(*Supreme Court of Pennsylvania.* 1861.)

Where one sells a mere "possibility," such as an estate which he expects or hopes to acquire on the death of a parent, either by descent or devise, such sale at the common law is a nullity, but in equity it may be enforced as an executory agreement to sell if it is sustained by a sufficient consideration.

The opinion of the court was delivered, July 24th 1861, by

STRONG, J.—The mortgage given by Mrs. Jay and her husband to Henry Bayler, was not a pledge or conveyance of any estate which she owned at the time of its execution. Nor did it profess to assure to the mortgagee any present interest. By it she bargained and sold to Henry Bayler, his heirs and assigns, "all the estate, right, title, and interest, in law or in equity, to which she would become entitled on the death of her father, Jacob Bayler, in his estate, real, personal, and mixed, by will, descent, or otherwise." She also covenanted jointly and severally with her husband, to

stand seised of the said estate, right, title, and interest, to the use of Henry Bayler and his heirs, and to make further assurances. Her father was then living. In his estate she had no property—no interest. The subject of the mortgage was, therefore, nothing that she then had. It was a mere expectancy, and the instrument of mortgage was made, not for any consideration then received by her, or parted with by the mortgagee, but solely for the purpose of securing a prior debt of her husband. Such being the facts of the case, and Mrs. Jay's father having since died, the question presented is, whether the mortgage is efficacious to enable the mortgagee to hold against her the share of the father's lands which descended to her.

It is an old and well settled rule of the common law, that a mere possibility cannot be conveyed or released; and the reason given for it is that a release or conveyance supposes a right in being: Shepp. Touch. 319; Litt. § 446; 1 Inst. 265 a; Fitzgibbons, 234; McCrackin *v.* Wright, 14 Johns. 193; Davis *v.* Hayden, 9 Mass. 514. At law, therefore, nothing passes by a deed of land of which the grantor is only heir apparent. Certainly nothing by its direct operation. And this is as true of conveyances which operate under the Statute of Uses, as of others. In such cases there is no seisin to give effect to the statute; and without seisin a conveyance can only operate as a common law grant. A covenant to stand seised to uses of land which the covenantor shall afterwards purchase, is void: 2 Sand. on Uses 83. A man cannot, by covenant, raise a use out of land which he hath not: Croke Eliz. 401. Recitals, it is true, and covenants, may conclude parties and privies, and estop them from denying that the operation of the deed is what it professes to be. And when a deed purports to pass a present interest, recitals and covenants have, in many cases, been held efficacious to pass to the grantee an interest subsequently acquired by the grantor. But when the deed does not undertake to convey any existing estate, when the subject of the grant is only an expectancy, it is difficult to conceive of it as anything more than a covenant for a future conveyance. In the very nature of things it must be executory. The case in hand is an apt illustration. The intention of the parties was not to convey any immediate interest, for it was known Mrs. Jay had none. The grant and the covenants alike contemplated an assurance to the mortgagee of an estate which might possibly thereafter be acquired either by descent or will, an assurance necessarily future.

But though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration. This has often been decided. In Hobson *v.* Trevor, 2 P. Wms. 191, Lord Chancellor Macclesfield compelled an execution of an agreement in marriage articles, to convey to the husband a third part of what should come to the father of the wife on the death of his father; and in Beckley *v.* Newland, 2 P. Wms. 182, the same chancellor enforced an agreement between the husbands of two presumptive heirs to divide equally what should be left to either of them. A similar agreement was enforced also in Wethered *v.* Wethered, 2 Sim. 183. See, also, Lyle *v.* Wynn, 8 Eng. Cond. Chanc. 406. These were all cases of executory agreements. But in Varick *v.* Edwards, 11 Paige 290, a formal conveyance of a possibility, or expectancy, though it had been ruled inoperative at law, was held good in equity. And in McWilliams *et al. v.* Nisly, 2 S. & R 507, Chief Justice Tilghman said, that "if one enter into articles to convey, in case subsequent events should make it lawful, there could be no doubt that in equity he would be decreed to convey when he subsequently acquired the power." And he added he did not think the case less strong because, instead of entering into articles, he makes an absolute conveyance.

Regarding then the mortgage made by Mrs. Jay of the estate which she expected thereafter to inherit from her father, as inoperative at law, and valid only in equity, if valid at all, it is next to be seen whether a chancellor would enforce it. That he would not, unless it was made for a valuable consideration, will not be claimed. The equity of the mortgagee, if any, springs out of the consideration, and, if that is wanting, he will vainly ask the aid of a chancellor. The reason why, before the Act of April 11th 1848, the husband's voluntary assignment of a wife's chose in action, did not destroy her right of survivorship, although he had succeeded to her dominion over the chose, was, because a chose in action was assignable only in equity; and an assignee without value given, was regarded as destitute of equity. In his behalf, therefore, no chancellor would move to enforce the assignment: Hartman *v.* Dowdel, 1 Rawle 281. It is not to be doubted that a wife may mortgage her lands for her husband's debt, by uniting with him in the instrument. And if this had not been a mortgage of mere expectancy, it would have been good without the interposition of a court of equity. It is because this mortgagee must come into such a court, that it becomes material to inquire whether there was such a consideration for the instrument as to induce a chancellor to interfere to give it effect. It was given to secure an antecedent debt of the husband. No new consideration was given at the time it was executed. The wife received nothing — the husband received nothing — the creditor parted with nothing. The instrument was, therefore, no more than a collateral security given for an old debt of the husband. As between Mrs. Jay and Henry Bayler, he was not a purchaser for value: Petrie *v.* Clark, 11 S. & R. 377; Walker *v.* Geisse, 4

Whart. 258; Depeau v. Waddington, 6 Id. 220. The question, then, is reduced to this: Will a court of equity interfere in favour of one who is an assignee or covenantee, but not for value, to enforce a wife's engagement to pay an old debt of her husband's? The answer is plain. If it will not decree the performance of an ordinary agreement, not founded on a valuable consideration, much less will it enforce such a contract against a *feme covert*. A creditor of the husband, who asks that the wife's estate shall be applied to the discharge of her husband's debts, must show a legal right or a complete equity. It is by no means clear that a married woman can, by any form of conveyance, even in equity, convey the estate which she expects to inherit. I know of no case in which such a conveyance has been sustained, and I doubt whether it is authorized by the Act of 1770, that established the mode by which a husband and wife may convey the estate of the wife. There are decisions in other states, that when a married woman, in conjunction with her husband, undertakes to convey her land with covenants of warranty, her deed estops her from claiming an after-acquired title. The after-acquired estate, as in other cases, is held to feed the estoppel: Nash *v.* Spofford, 10 Met. 192; Hill's Lessee *v.* West, 8 Ohio 226. Even this, however, has been denied in New York, New Jersey, and New Hampshire. But the case is very different where the wife attempts to convey and warrant land which she does not own, but something which she hopes or expects afterwards to acquire. It may be doubted whether, to do such an act, all common law disability does not remain. Whether this be so or not, her deed is no more than an executory contract, and, if supportable in equity, requires a valuable consideration to give it life. There having been none for the mortgage of Mrs. Jay — no other having been shown but a precedent debt of the husband, which the instrument was given to secure, the Court of Common Pleas committed no error in instructing the jury that it could not be enforced as the mortgage of the wife.

This view of the case makes it needless to consider the exception taken to the admission of evidence to contradict the commissioner's certificate of the wife's separate acknowledgment.

The judgment is affirmed.

(See, also, 3 Pom. Eq. Jur. § 1287; Snell, Eq. 72; Spence, Eq. Jur. 852; 2 Story, Eq. Jur. § 1040*b*.; Hobson v. Trevor, 2 P. Wms. 191; Wright v. Wright, 1 Ves. Sr. 409; Bennett v. Cooper, 9 Beav. 252; Varick v. Edwards, 11 Paige, 289; Edwards v. Varick, 5 Denio, 664, 682; Nimmo v. Davis, 7 Tex. 26; Horst v. Dague, 34 Ohio St. 371; Power's Appeal, 63 Pa. St. 443; Hannon v. Christopher, 34 N. J. Eq. 459.)

(As to sale of "possibility" with ancestor's consent, see Jenkins v. Stetson, 9 Allen, 128.)

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PART III.

# DOCTRINES OF EQUITY.

## I. CONVERSION.

(10 Pet. 532.)

PETER v. BEVERLY.

(*Supreme Court of the United States.* 1836.)

*Mr. Justice* THOMPSON delivered the opinion of the court:

This case comes up on appeal from the Circuit Court of the District of Columbia for the County of Washington. The bill was filed by the appellees in the court below to enjoin the appellants from proceeding to sell certain lots of land in the city of Washington, belonging to the estate of David Peter, for the payment of debts alleged to be due to the Bank of Columbia and the Bank of the United States. David Peter made his will bearing date the 30th of November, 1812, and shortly thereafter departed this life, and by his will he declares and directs as follows:

"It is my intention that the proceeds of all my estate shall be vested in my dear wife Sarah Peter for the maintenance and education of my children.

"I wish all my debts to be as speedily paid as possible; for which purpose I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose; and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object.

"I desire that no appraisement or valuation shall be had of any part of the property attached to my dwelling-house.

"I desire that my sons shall receive as good educations as the country will afford, and my daughters the best the place can furnish."

And he appointed his wife Sarah Peter, his brother George Peter, and his brother-in-

law Leonard H. Johns, the executrix and executors of his will, of whom George Peter is the only survivor.

The bill charges that George Peter, the surviving executor, under color of the directions in the will, was about to sell that part of the real estate of David Peter which lies in the city of Washington, and has actually offered the same for sale at public auction. The bill further charges that there came to the hands of the executors personal estate of the said David Peter to the amount of more than $25,000. That they had sold the Dulin farm for $20,688.90 to George Magruder, in the year 1813, and received one third of the purchase money, and took for the balance, divided in equal sums, two promissory notes, one payable the 1st of January, 1815, and the other the 1st of January, 1816; one indorsed by Patrick Magruder and the other by Lloyd Magruder. That the purchaser, George Magruder, was put into possession of the farm and still holds it, and that the notes given for the balance of the purchase money have been lost by the negligence of the executors. The complainants deny the existence of any debt due from the estate of David Peter to the said banks, or either of them; or any other debt whatsoever, for the payment of which it is either necessary, proper or lawful for the said George Peter to sell the said city lots. And the bill prays that the executor may fully account for the real and personal estate of the said David Peter, and show how the same has been disposed of, and that the banks may be required to produce the notes or other evidence of their pretended debt, and prove the same; and praying an injunction to restrain the said George Peter and his agents from selling or in any way disposing of, or encumbering the real estate of the said David Peter in the District of Columbia, concluding with a prayer for general relief.

The injunction was granted, and, on the coming in of the answer, was ordered to be continued until the final hearing of the cause.

The answer of George Peter, the surviving executor, alleges that the principal management of the business of the estate was assumed by his co-executors; that believing Johns fully competent, and that he would attend to the business in a way best calculated to promote the interest of his sister and her children, he left it for them to settle the estate, and to collect and dispose of the proceeds thereof, and provide for the support and education of the children, as they might think best, and that all this was well known to the complainant Beverly, who married the eldest daughter of the testator in the year 1819. That he and his wife lived with her mother until within a year or two of her death.

That the debts due to the banks have been continued by renewed notes, and from time to time, drawn and indorsed by the executors, in compliance with the rules of the banks, and with the understanding that such arrangement was to continue as long as the banks were willing to indulge the estate, or until the executors should be able to make sales for the payment of those debts; that this arrangement was well understood by Beverly and all the children, who were old enough to understand anything of their affairs, and was often talked of by Beverly and Ramsay, who always spoke of the estate as liable to the banks for these debts. The surviving executor, to the charge of neglect in relation to the balance of the purchase money for the Dulin farm, alleges that Magruder, the purchaser, was sued upon the notes given for the balance, and became insolvent. That an ejectment was brought to recover possession of the land that it might be resold, no title having been given for the land, but only a bond for a deed, according to the terms of the sale. That the ejectment was removed to the Court of Appeals in Maryland, where he believes it is still pending. That if there was any neglect or delay in recovering this land, it was the fault of the complainant Beverly, who undertook to attend to it, being then agent for the estate.

The answer of the banks refers to the answer of the surviving executor for the facts stated, in relation to the arrangement between the executors and the banks, which, it is averred, was entered into to save the estate of the testator from a sacrifice, and to continue the accommodation. That the executors and the banks, and the agents of the banks, one of whom was the complainant Beverly, always so understood it, and looked to the trust estate as still liable to the banks. They exhibit statements showing the situation of the debts at the death of the testator, and the various renewals by the executors afterwards, in their private capacity, with the various payments which had been made, and showing the balance now due.

An amended bill was afterwards filed, calling for an account of other moneys alleged to have been received by the executors, and charging more particularly, negligence in the executors in not having sued the indorsers of the notes of Magruder for the balance of the purchase money of the Dulin farm, and the loss thereof by reason of such neglect.

To this amended bill, the surviving executor answers, stating his knowledge and belief respecting the moneys for which he is called upon to account, denies the negligence imputed to him, and avers that if there was any negligence it was that of the complainant Beverly, who, being interested in the estate, and being a lawyer, undertook to attend to the recovery of the balance of the purchase money. That the indorsers were in very doubtful circumstances; that the land was considered by all parties interested as sufficient security for the balance of the purchase money, and that the counsel of the executors advised the resort to a resale of the

land as the best remedy for the recovery of such balance, and for that purpose an ejectment was brought to recover the possession, and a bill in chancery filed in Maryland under the direction and superintendence of Beverly; and that if any negligence occurred in the prosecution of these suits it was attributable to him.

The cause was referred to the auditor to take and report an account of all sums of money received by the executors from the real and personal estate respectively, and of the sums paid by them in the due course of administration; and of any other sums paid by them for the maintenance of the family and the education of the children, stating them separately. The auditor reports a large balance due the executors, allowing them for the maintenance of the family and the debts paid by them. To this report the complainants excepted, and the exceptions were overruled, and at the March Term of the Circuit Court in 1835, a final decree was entered confirming the report of the auditor, and decreeing a perpetual injunction. From this decree of a perpetual injunction, the defendants in the court below appealed, and from so much of the decree as confirmed the report of the auditor the complainants appealed, and upon these cross appeals the cause comes here for review.

In examining the various questions which have been made in this case, the most natural order seems to be to consider, in the first place, the will of David Peter. Upon this depends, in a great measure, the rights of the banks as creditors of the estate, and the rights, duties and responsibilities of the executors; and particularly those which devolve upon George Peter, the surviving executor.

David Peter died in the year 1813, shortly after making his will, leaving his widow with a family of five children, two daughters and three sons, the eldest about thirteen years of age, living in ease and supposed affluence, as appears, not only from the pleadings and proofs in the case, but as fairly to be inferred from the provisions made for them by his will, and the disposition made of his property. His primary object seemed to be that his family should remain together and live as they had been accustomed to live. And he accordingly, in the first place, directs that the proceeds of all his estate should be vested in his wife, Sarah Peter (who is made one of his executors,) for the maintenance and education of his children. He directs that no appraisement or valuation should be had of any part of his property attached to his dwelling-house, and that his sons should receive as good educations as the country would afford, and his daughters the best the place could furnish. The family accordingly remained together, except Mrs. Beverly, and were maintained and educated according to the directions of the will, until the death of the said Sarah Peter, in the year 1825. The testator directed his debts to be paid as speedily as possible, and for that purpose declared that the tract of land on which Dulin lived, together with all the personal property thereon, should be sold and applied to the payment of his debts; and in aid of that, as soon as sales could be effected, so much of his city property as should be necessary for the payment of his debts.

The testator had a right, unquestionably, so far as respected his children, to charge the payment of his debts upon any part of his estate, real or personal, as he might think proper and most advantageous to his family. And if the creditors were willing to look to the fund so appropriated to that object, no one would have a right to counteract or control his will in that respect. And he having thought proper to constitute his widow the trustee of the proceeds of all his estate for the maintenance and education of his children, thereby vesting in her an unlimited discretion in this respect so far as the proceeds of his estate would go, the surviving executor is not accountable for anything applied by her for that purpose, not even if she would be chargeable with a *devastavit*. For it is a well-settled rule that one executor is not responsible for the *devastavit* of his co-executor any farther than he is shown to have been knowing and assenting at the time to such *devastavit* or misapplication of the assets, and merely permitting his co-executor to possess the assets, without going farther and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets. (Cro. Eliz., 348; 4 Ves., 596; 4 Johns. Ch., 23; 19 Johns. Rep., 427.)

It is not intended to intimate that there was any *devastavit* or waste of the estate by Mrs. Peter. There is, indeed, no pretense in the bill of any misapplication of the estate by her or any other of the executors, and for the very purpose for which the proceeds of the estate were vested in her, to maintain and educate a family of young children, it was necessary to clothe her with a large discretion; and for this reason the testator directs that there should be no appraisement or valuation of any part of his property attached to his dwelling-house. The proceeds of all his estate being vested in his widow, would render it necessary, independent of any express direction in the will, that recourse should be had to the real estate for the payment of his debts.

And this leads, in the next place, to the inquiry whether George Peter, the surviving executor, has authority to sell the lots in the city of Washington.

With respect to the Dulin farm no doubt can exist. The testator gives positive directions for that farm to be sold, and the proceeds applied to the payment of his debts. The executors in the sale to Magruder only gave a bond for a deed; the title was not to

be given until the purchase money was all paid, and that not having yet been done, no title has been conveyed, and it yet remains subject to be applied to the payment of debts; and a resale is necessary in order fully to carry into effect the will of the testator. It is a well-settled rule in chancery, in the construction of wills as well as other instruments, that when land is directed to be sold, and turned into money, or money is directed to be employed in the purchase of land, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. This is the doctrine of this court in the case of *Craig* v. *Leslie* (3 Wheat., 577), and is founded upon the principle that courts of equity, regarding the substance, and not the mere form of contracts and other instruments, consider things directed, or agreed to be done, as having been actually performed. But this principle may not perhaps apply in its full force and extent to the city lots. They are not positively directed by the will to be converted into money; but the sale of them was contingent, and only in aid of the proceeds of the Dulin farm, if a sale of them should become necessary for the payment of debts. But independent of this principle, there is ample power in the surviving executor to sell. We find, in the cases decided in the English courts, and in the elementary treatises on this subject, no little confusion, and many nice distinctions.

The general principle of the common law, as laid down by Lord Coke (Co. Lit., 112, *b*) and sanctioned by many judicial decisions, is that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive. But when the power is coupled with an interest, it may be executed by the survivor. (14 Johns. Rep., 553; 2 Johns. Ch., 19.)

But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, *to* the executors to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise. For a trust will survive though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian, or other trustee, is invested with the rents, and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives. (1 Caines's Ca. in Er., 16; 2 Peere Wms.)

In the American cases there seems to be less confusion and nicety on this point, and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity as executors, and there are no words in the will warranting the conclusion that the testator intended, for safety or some other object, a joint execution of the power, as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail for want of a trustee. This is the doctrine of Chancellor Kent in the case of *Franklin* v. *Osgood* (2 Johns. Ch. 19), and cases there cited, and is in accordance with numerous decisions in the English courts. (3 Atk., 714; 2 Peere Wms., 102.) And is adopted and sanctioned by the Court of Errors in New York, on appeal, in the case of *Franklin* v. *Osgood*. And *Mr. Justice* Platt in that case refers to a class of cases in the English courts, where it is held that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell, yet, if from its connection with other provisions in the will it clearly appears to have been the intention of the testator that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognized by the Supreme Court of Pennsylvania in the case of *The Lessee of Zebach* v. *Smith* (3 Binney, 69). The court there considered it as a settled point that if the authority to sell is given to executors, *virtute officii*, a surviving executor may sell; and that the authority given by the will in that case to the executors to sell, was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in the law.

Although the clause in the will now under consideration does not name the executors as the persons who are to sell the land, yet it is a power vested in them by necessary implication. The land is to be sold for the purpose

of paying the debts, which is a duty devolving upon the executors; and it follows, as a matter of course, that the testator intended his executors should make the sale to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his Treatise on Powers (page 167), on the authority of a case cited from the year books, lays it down as a general rule that when a testator directs his land to be sold for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have, by implication, the power to sell. And this is the doctrine of Chancellor Kent, in the case of *Davoue* v. *Fanning* (2 Johns. Ch., 254). The will, in that case, as in this, directed the real estate to be sold for certain purposes therein specified, but did not direct expressly by whom the sale should be made; and he held, as Lord Hardwicke did in a case somewhat similar (1 Atk., 420), that it was a reasonable construction that the power was given to the executors, that it was almost impossible to mistake the testator's meaning on that point. So, in the present case, it is impossible to draw any other conclusion than that it was the testator's intention that the sale should be made by his executors. *Jackson* v. *Ferris* (15 John., 349) is a case very much in point on both questions. That the power in this case is coupled with an interest, and survives, and that by implication, it is to be executed by the surviving executor The testator, say the court in that case, directed that in case of a deficiency of his personal estate to pay his debts, some of his real estate should be sold, without naming by whom; and one of the executors only undertook the execution of the will, and sold the land, and the court held that this was a power coupled with an interest, and might be executed by one of the executors, it being a power to sell for the payment of debts.

It has been thought proper to dwell a little more at large upon the construction of this will, and the power given to the executors to sell, than would have been deemed necessary had it not been supposed and urged at the bar that the Court of Appeals of Maryland had given a different construction to the will than the one we have adopted. This will was brought under the consideration of that court in the ejectment suit for the recovery of the Dulin farm already referred to (4 Gill & Johnson, 323); and it is true the court does say that the power given in the will to sell is a mere naked power. But this was not the main point before the court. The question seemed to turn upon the demises in the declaration, and whether the legal estate in the land was in Mrs. Peter and her children, so as to enable them to maintain an action of ejectment. As the clause in the will directing a sale of the land did not direct it to be made by the executors, it became a question whether the executors had that power by implication; or whether it was a case coming within the Maryland law of 1785, which provides that if a person shall die leaving real or personal estate to be sold for the payment of debts, or other purposes, and shall not appoint a person to sell and convey the property, the Chancellor shall have the power to appoint a trustee for that purpose. And the court seemed to think the will now in question came within that provision. But this case, however respectable the authority may be, cannot be admitted to control the decision in the case now before the court, where the lands in question lie in the city of Washington: and we entertain a very decided opinion that the power to sell given by this will is a power coupled with an interest, which survives, and may be executed by the surviving executor.

The next inquiry is, whether there is any subsisting debt due from the estate of David Peter to the banks. It is contended on the part of the complainants in the court below, that this debt has been extinguished by the notes given by the executors, and no longer remains a debt due from the estate. There is no pretense that these debts have, in point of fact, been paid; and if not, the trust has not been executed, and the land still remains charged with it. If the executors have paid the debt to the banks, or the banks have accepted their notes in payment in place of the notes of the testator, so that the executors became the debtors, and personally responsible to the banks, the only effect of this is that the executors became the creditors of the estate instead of the banks, and may resort to the trust fund to satisfy the debt. (2 Peere Wms., 664, *note;* 7 Har. & John., 134; 4 Gill & Johns., 303; 2 Pick., 567.)

But there is no ground for considering the debt of the banks extinguished. David Peter at the time of his death was largely indebted to these banks upon indorsed notes discounted by them; and to prevent these notes from lying under protest, an arrangement was made between the banks and the executors to substitute notes drawn by Sarah Peter, and indorsed by Leonard H. Johns and George Peter; and the notes of David Peter were retired by this substitution, and passed as credits to the executors in the Orphan's Court as paid, when in truth and in fact they were not paid. The substitution of the notes of the executors was only by way of renewal, and to comply with the rules of the banks, and thus to continue the debts by the indulgence of the banks, until the executors should be able to make sales for the payment of them, without any intention or understanding by any of the parties that the substituted notes were offered or received as payment of the debts. That such was the arrangement made respecting these debts, and so understood by Beverly at least, is established by the most clear and satisfactory evidence; and there is good reason to believe that this was well understood in the family by all the children who were of an age sufficient to understand the business and concerns of the estate. This arrangement under such circumstances cannot, in any manner, be considered an ex-

tinguishment of the debt. The law on this subject is well settled, and the principle well and succinctly laid down in the case of *James* v. *Hackley* (16 Johns., 277). It is, say the court, a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is received as payment. It is unnecessary in the present case to carry the principle so far as to say there must be an express agreement for that purpose in order to operate as payment, but the evidence must certainly be so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties. And the rule to this extent is settled by the most unquestioned authority. (11 Johns., 513; 14 John., 404; 2 Gill & Johns., 493; 7 Har. & Johns., 92.)

In the original bill, the complaint against the executors for not having collected the balance of the purchase money can hardly be considered a charge of negligence, and much less of that gross negligence which ought to make the executor personally responsible. It barely alleges that this balance ought to have been received if the executors had only used reasonable diligence in regard to the collection. But after the answer and explanation of the executor to this charge came in, an amended bill was filed, charging the executor with gross negligence in this respect. This seemed to be an after-thought, and rather a stale allegation. But the answer and explanation of the executor, uncontradicted in any manner, fully exonerates the executors from all culpable negligence. Magruder was prosecuted for the balance of the purchase money, he became insolvent, and no further payment could be obtained from him. An ejectment was brought to recover possession of the land, that it might be again sold; the cause was tried in the County Court, and removed to the Court of Appeals, where the judgment was reversed, and a *procedendo* awarded. This business was principally under the care and direction of the complainant, Beverly, and if there was any want of due diligence in prosecuting the suit, it is chargeable to him, and not to the executor. And besides, the executor in the whole of this business acted under the advice of counsel, which shows satisfactorily that he acted in entire good faith, and would go very far to exonerate him from the charge of negligence, even if there were circumstances leading to a contrary conclusion. (2 John. Ca., 376.)

From this view of the case, we are satisfied that the direction in the will of David Peter to sell a portion of his real estate for payment of his debts, created a power coupled with an interest that survives. That the surviving executor is, by necessary implication, the person authorized to execute that power and fulfill that trust. That the debt due the banks has not been extinguished by the notes substituted by the executors as renewals in the bank, or the estate of the testator in any way discharged from the payment of the debt. That the executors are not chargeable with negligence or misapplication of the personal estate that ought to render them personally responsible for these debts; and that no reason has been shown why satisfaction of these debts should not be had out of the lands appropriated by the testator for that purpose.

It remains only very briefly to notice the exceptions which were filed to the report of the auditor, and most of these have been disposed of by the principles laid down in the foregoing opinion. It is proper here to observe that, from the report of the auditor upon the accounts exhibited by the executors and allowed by him, there has at all times been and now is a considerable balance in favor of the executors against the estate.

With respect to the first and second exceptions, it is true that the auditor has not charged the executors with the inventories; and he ought not, according to the principles upon which he makes his statement—the object of the reference to him being to ascertain whether the executors were indebted to the estate or the estate to them—and for this purpose he examined the several statements made by the executors with the Orphan's Court, and he extracted from them the several sums received and paid by them. In the account with the Orphan's Court the executors are charged with the amount of the inventory of the personal estate, both in the District of Columbia and in Maryland; and as far as any proceeds of the personal estate came into the hands of the executors, they are charged in the statement of the auditor, but they are not charged with what the widow and heirs retained in their hands, and for their own use; and this was correct, according to the provisions in the will, for the maintenance of the family and the education of the children.

The $4,552 mentioned in the third exception were properly omitted in the statement of the account against the executor. It was a portion of that part of the estate which was put into the hands of the widow, attached to the dwelling-house, and with respect to which the testator directed that no appraisement or valuation should be made.

The fourth and fifth exceptions relate to the notes taken from Magruder for the balance of the purchase money of the Dulin farm. The executors, as has been already shown, are not chargeable with those notes. No negligence is imputable to them which ought to make them personally responsible. No title has been given for the farm, and it may yet be resorted to for payment of this balance of the purchase money.

The auditor has properly given credit to the executors for the taxes on the real estate. There is no suggestion that the taxes were not due and paid by somebody. The amount appears to have been paid according to the account of the register, and it is fairly to be presumed that they were paid by the executors, although no regular vouchers are produced for such payment. This may be accounted for, in some measure at least, by

the circumstances stated in the answer of George Peter of the destruction by fire of the books and accounts of his co-executor, Leonard H. Johns, who had the principal management of the estate.

The allowance of $6,000 for the expenses of the family for twelve years must certainly be a very moderate charge. It was a proper subject of inquiry for the auditor, and there is no ground upon which this court can say the allowance is exceptionable. From the nature of the expenditure for the daily expenses of the family, it could hardly be expected that a regular account would be kept, and especially under the large discretion given by the testator in his will in relation to the maintenance of his family.

The amount paid by the executors for the curtails and discounts on the notes running in the banks were properly allowed to their credit. These were debts due from the estate, and whatever payments were made were for and on account of the estate.

These are all the exceptions taken to the report of the auditor, and we think they were all properly overruled by the court below. But the court erred in decreeing a perpetual injunction.

*The decree of the Circuit Court must accordingly be reversed, the injunction dissolved, and the bill of the complainants dismissed.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel; on consideration whereof, it is ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said Circuit Court ought to have rendered in the premises, doth order, adjudge and decree, that the injunction in this cause be, and the same is hereby dissolved; and that the bill of the complainants be, and the same is hereby dismissed; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to said court to carry this decree into effect.

(See, also, Craig v. Leslie, supra; Adams, Eq. p. 135, note; Story, Eq. Jur. §§ 1212–1215; Snell, Eq. p. 169; 1 Pom. Eq. Jur. § 371; Kane v. Gott, 24 Wend. 660; Willing v. Peters, 7 Pa. St. 287; Parkinson's Appeal, 32 Pa. St. 455; Shaw v. Chambers, 48 Mich. 355, 12 N. W. Rep. 486; Perkins v. Coughlan, 148 Mass. 30, 18 N. E. Rep. 600; Leiper v. Thomson, 60 Pa. St. 177; Lent v. Howard, 89 N. Y. 169; Peterson's Appeal, 88 Pa. St. 397; Hood v. Hood, 85 N. Y. 561; and cases cited under "Maxim 12.")

## II. ELECTION.

### This doctrine rests upon the maxim that "he who seeks equity must do equity."

(7 Cranch, 370.)

HERBERT v. WREN.

(*Supreme Court of the United States.* 1813.)

Where a legacy is bestowed upon a widow, and it is intended by the testator that she shall take the legacy in lieu of dower, she is put to her election which she will accept.

MARSHALL, *Ch. J.*, after stating the case, delivered the opinion of the Court as follows:

The material questions in the cause are:

1. Has a Court of equity jurisdiction in the case?

2. Is the Plaintiff, Susanna, entitled to dower?

3. If these points be in her favor, what decree ought the Court to make?

According to the practice which prevails generally in England, Courts of equity and Courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favor of this jurisdiction: one of which is, that partitions are made and accounts are taken in chancery in a manner highly favorable to the great purposes of justice. In this case, dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate as well as of assignment of dower in the part of which Lewis Hipkins died seized.

An additional reason and a conclusive one in favor of the jurisdiction of a Court of equity is this: The lands are in possession of a purchaser who has not yet paid the purchase money. A Court of law could adjudge to the Plaintiffs only a third part of the land itself. Now, if the Plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales and to receive a compensation for her dower instead of the land itself, a Court of equity ought never, by refusing its aid, to drive her into a Court of law and compel her to receive her dower in the lands themselves. This is therefore a proper case for application to a Court of Chancery.

2. It is perfectly clear that the provision made by Lewis Hipkins in his last will is no bar to a claim of dower, for several reasons, of which it will be necessary to mention only two.

1. It is not expressed to be made in lieu of dower.

2. It is not averred that she has accepted the provision and still enjoys it.

3. It remains to inquire what decree the Court ought to make in the case.

The first question to be discussed is this. Is the Plaintiff, Susanna, entitled both to dower and the provision made for her in the will of her late husband?

The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary from the previously existing common law.

In the English books, there are found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which she has been permitted to hold both. The principle upon which these cases go appears to be this:

It is a maxim in a court of equity not to permit the same person to hold under and against a will. If therefore it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention discovered in other parts of the will must be defeated by the allotment of dower to the widow, she must renounce either her dower, or the benefit she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of Arnold v. Kempstead and wife, of Villareal and lord Galway, and of Jones v. Collier and others, reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election.

In the case under consideration, neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife compared with the whole estate is not in proof: but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify.

The only fund provided for the maintenance and education of his five children is the rent of 140*l.* per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained.

The clause, too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the incumbrance of dower.

Upon this view of the will, it is the opinion of the majority of the Court that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not however lost the right of election. No evidence is before the Court that she accepted the provision of the will, nor that she still enjoys it. Indeed there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life from its operation, nor is the Court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual reception of one third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is therefore apparent that she never intended to abandon her claim to dower.

The next inquiry to be made by the Court is, to what profits is the Plaintiff, Susanna, entitled in consequence of the detention of dower?

It is unnecessary to decide whether, in general, a person claiming dower from a purchaser can recover profits which accrue previous to the institution of her suit. In this case the Plaintiff was in the actual enjoyment of dower. She received one third of the rent accruing from the premises for nine years. She was therefore in full possession of her dower estate; and when afterwards the land was sold under a decree of a Court, P. R. Fendall was one of the executors who made the sale, and was himself in effect the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case therefore the Plaintiff is entitled to one third of 140*l.* per annum for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the Plaintiff, Susanna, cannot claim the profits on her dower and hold any portion of the particular estate devised to her, or of

the profits on that estate. An account therefore must be taken, if required by the Defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one third of the purchase money, might legally be made.

This must be considered as a compromise between the Plaintiffs and the Defendant, Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other Defendants They have a right to insist that, instead of a sum in gross, one third of the purchase money shall be set apart and the interest thereof paid annually to the tenant in dower during her life.

If the parties all concur in preferring a sum in gross to the decree which the Court has a right to make, still it is uncertain on what principle seven years were taken as the value of the life of the tenant in dower. It is probably a reasonable estimate, but this Court does not perceive on what principles it was made, nor does the record furnish the means of judging of its reasonableness.

This Court is of opinion that there is error in the decree of the Circuit Court in not requiring the Plaintiff, Susanna, to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate if she shall elect to take dower. The decree is to be reversed and the cause remanded for further proceedings in conformity with the following decree:

This Court is of opinion that the Plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins, died seized, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said Lewis. She ought therefore to have made her election either to adhere to her legal rights and renounce those under the will, or to adhere to the will and renounce her legal rights, before a decree could be made in her favor.

This Court is farther of opinion that the Plaintiff, Susanna, having been in possession of her dower by the receipt of rent for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession from the time when he ceased to pay the same, until the sale was made to the Defendant, Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon since the same was sold and conveyed to him, to ascertain which an account ought to be directed. And the Court is further of opinion that an account ought also to be directed to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will: all which must be deducted from her claim for dower.

The Court is further of opinion that if the parties or either of them shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one third part of the purchase money, given by the said Joseph Deane for the lands in which the Plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive during life the interest accruing thereon, and shall apply to the Circuit Court to reform its decree in this respect, the same ought to be done.

It is the opinion of this Court that there is no error in the decree of the Circuit Court for the county of Alexandria in determining that the Plaintiff, Susanna, was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This Court doth therefore reverse and annul the said decree; and doth remand the cause to the said Circuit Court with instructions to reform the said decree according to the directions herein contained.

(See, also, Washburn v. Van Steenwyk, 32 Minn. 336, 20 N. W. Rep. 324; Adsit v. Adsit, 2 Johns. Ch. 448; Wilbanks v. Wilbarks, 18 Ill. 17; Nerris v. Clark, 10 N. J. Eq. 51; Cauffman v. Cauffman, 17 Serg. & R. 16; Dillon v. Parker, 1 Swanst. Ch. 394, note; Neys v. Mordaunt, 2 Vern. 581; Whistler v. Webster, 2 Ves. Jr. 367; 1 Pom. Eq. Jur. § 464; Story, Eq. Jur. § 1075; Snell, Eq. p. 201; Adams, Eq. p. 91.)

(See cases under "Maxim 3.")

## III. *a.* SATISFACTION.

**This doctrine illustrates the maxim, that "he who seeks equity must do equity."**

(12 Mass. 391.)

STRONG v. WILLIAMS.

(*Supreme Judicial Court of Massachusetts.* 1815.)

PUTNAM J. delivered the opinion of the court.

The general rule anciently established in chancery was, that when a testator being indebted gave to his creditor a legacy equal to, or exceeding the amount of his debt, the legacy should be considered as a satisfaction for the debt. The rule has been acknowledged in later cases, but with marks of disapprobation, and a disposition to restrain its operation in all cases where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention. *Haynes* v. *Mico*, 1 Bro. Cha. Ca. 131. Thus where the testator left a sufficient estate, it was determined that he was to be presumed to have been kind as well as just. So if the legacy was of a less sum than the debt; or of a different nature; or upon conditions; or not equally beneficial in some one particular, although more so in another.

All the cases agree that the intention of the testator ought to prevail; and that, *prima facie* at least, whatever is given in a will is to be intended as a bounty. But by later cases the courts have not been disposed to understand the testator as meaning to pay a debt, when he declares that he makes a gift; unless the circumstance of the case should lead to a different conclusion.

Thus in the case cited for the plaintiff, *Brown* v. *Dawson*, 2 Vern. 498, where the wife joined in the sale of her jointure, and the husband gave her a note of 7*l.* 10*s.* *per annum* for her life; and afterwards upon another such sale he gave her a bond for 6*l.* 10*s.* *per annum* for her life; and he afterwards made his will, and gave her 14*l.* *per annum* for life: the legacy was adjudged to be a satisfaction for the note and bond. Here it will be perceived that the annuity given in the will amounted exactly to the sums secured by the bond and note: and the presumption of satisfaction proceeded upon the similitude of the legacy to the debt. 2 Fonbl. 330, *in notis*. So in the case of *Fowler* v. *Fowler*, 3 P. Will. 353, the general rule was applied. There the husband, being indebted to the wife for arrears due by the marriage settlement, gave her a larger legacy by the will: and it was held a satisfaction of the debt. But it is to be observed that lord chancellor *Talbot* expressed great dissatisfaction with the rule: and it does not appear that any circumstances could be found, to take the case out of its general application. In that case the court refused parole evidence, to prove that the testator intended both should be paid.

But cases of this nature must depend upon the circumstances: and there must be a strong presumption, to induce a belief that the testator intended the legacy as a payment, and not as a bounty. 2 Fonbl. 332. Thus where the testatrix had given her servant a bond for 20*l.* free of taxes for her life, and afterwards made her will and gave the servant 20*l.* *per annum* payable half yearly, but said nothing about the taxes, the court held that both should be paid. *Atkinson* v. *Webb*, 2 Vern. 478.—Here the legacy, being not quite so beneficial as the debt, did not raise a presumption that it was intended as a payment.

So where the testator having sufficient assets, and having manifested great kindness for the legatee, gave a legacy of a greater amount than he owed, it was holden by lord chancellor *Cowper*, that the testator might be presumed to be kind as well as just: and he decreed the payment of the legacy as well as the debt. *Cuthbert* v. *Peacock*, 1 Salk. 155. It has been holden that a legacy for a less sum than the debt shall never be taken as satisfaction; 2 Salk. 508; and that *specific things* devised are never to be considered as satisfaction of a debt, unless so expressed. 2 Eq. Ca. Abr. title Devises pl. 21, cited Bac. Abr. Legacies D.

So the circumstance, that the testator had devised "that all his debts and legacies should be paid," was holden sufficient to take the case out of the general rule: as where the testator, indebted to his maid servant 100*l.*, *by bond for wages*, afterwards gave her 500*l.* lord chancellor *King* decreed that both should be paid, as the testator had made provision for the payment of his debts. 1 P. Will. 408, 409, *vide note*.

So where it appeared that the legatee had lived with the testatrix as a servant for twenty or thirty years, and she had given her a bond for 260*l.* and in one month afterwards she made her will and gave her 500*l.*: and in another clause she gave the rest of her servants 5*l.* apiece, but not to *Jane Greese*, the legatee; "because," said the testatrix, "I have done well for her before;" and she also made provision for her debts and legacies. Lord *Hardwicke* thought the circumstances above stated took the case out of the general rule, and decreed the legacy to be no satisfac-

tion for the debt. *Richardson* v. *Greese*, 3 Atk. 65; *Nicholls* v. *Judson, S. P.*, 2 Atk. 301; *Clark* v. *Sewell, S. P.*, 3 Atk. 97.

So where the testator was indebted *for goods on an open account*, a legacy for a larger sum was not held a satisfaction: because he might not know whether he was indebted or not; and therefore no presumption was to arise, that he intended merely to pay a debt. *Powel's Case*, 1 P. Will. 299; 10 Mod. Case No. 201, p. 398.

In the case at bar, the consideration for the legacy appears from the will to have been for the services of the legatee. A presumption that the legacy was intended to be a satisfaction of the bond also, must rest on the fact that the bond was given for the same services: of which fact there is no evidence before us. It may have been for a different cause. We can only presume that it was for a lawful one.

It appears also from the will, that the testator intended his debts and legacies should be paid, before his residuary legatees should take any thing. The pecuniary legacy to the plaintiff also is not so much as the debt; and therefore cannot be considered as a payment of it. Neither is there any declaration of the testator, that the specific articles given should be considered as a satisfaction of the debt. It appears also that there are sufficient assets.

From a consideration of the principles and decisions applicable to this case, we are therefore all of opinion that the plaintiff ought to recover.

*Defendant defaulted.*

(See, also, note to above opinion; 1 Pom. Eq. Jur. § 520 et seq.; Snell, Eq. p. 230; Story, Eq. Jur. §§ 1099, 1109, 1119, 1120; Byrne v. Byrne, 3 Serg. & R. 54; Wesco's Appeal, 52 Pa. St. 195; Horner's Ex'r v. McGaughy, 62 Pa. St. 189; Parker v. Coburn, 10 Allen, 82; Allen v. Merwin, 121 Mass. 378; Eaton v. Benton, 2 Hill, 576.)

(See cases under "Maxim 3.")

## *b.* PERFORMANCE.

### This doctrine rests upon the maxim that "equity imputes to parties an intention to fulfill an obligation."

(1 P. Wms. 323.)

BLANDY v. WIDMORE.

(*High Court of Chancery.* 1716.)

LORD CHANCELLOR. I will take this covenant not to be broken, for the agreement is to leave the widow 620£. Now the intestate in this case has left his widow 620£, and upwards, which she, as administratrix, may take presently upon her husband's death, wherefore let her take it; but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant, so that she shall not come in first as a creditor for the 620£, and then for a moiety of the surplus.

And Mr. Vernon said: It had been decreed in the case of Wilcocks v. Wilcocks, [2 Vern. 558,] Trinity Term, 1706, that if a man covenants to settle an estate of 100£ per annum on his eldest son, and he leaves lands of the value of 100£ per annum to descend upon such son, this shall be a satisfaction of the covenant to settle, and that this last was a stronger case, it being the case of an heir, who is favored in equity; also the case of Phiney v. Phiney, [Id. 638,] was cited. Whereupon the decree made by Sir John Trevor, master of the rolls, was now affirmed by Lord Chancellor Cowper.

(See, also, 2 Pom. Eq. Jur. § 578 et seq.; Snell, Eq. p. 221; Story, Eq. Jur. § 1106 et seq.; Goldsmid v. Goldsmid, 1 Swanst. Ch. 211; Garthshore v. Chalie, 10 Ves. 1; Deacon v. Smith, 3 Atk. 323; Wilson v. Piggott, 2 Ves. Jr. 351, 356.)

N. B. Satisfaction and performance are closely related. Mr. Snell makes the following distinction: "An important distinction exists between satisfaction and performance. Satisfaction, it is true, like performance, supposes intention; nevertheless in satisfaction, the thing done is something different from the thing covenanted to be done, and is in fact a substitute for the thing covenanted to be done, whereas in performance the identical act which the party contracted to do is considered to have been done."

## IV. PENALTIES AND FORFEITURES.

**The doctrine of penalties and forfeitures is based upon the maxim that "equity looks to the intent rather than to the form."**

(2 Minn. 350, Gil. 302.)

MASON v. CALLENDER.

(*Supreme Court of Minnesota.* 1858.)

1. Upon a note providing for interest at the rate of three per cent. per month, and after maturity, interest on principal and interest at the rate of five per cent. per month till paid. *Held*, that what is recoverable for withholding money after it is due, is not strictly interest, but damages; and the clause for five per cent. per month after due, is not a stipulation to pay interest, strictly speaking, but an attempt to liquidate the damages.

2. That the only cases in which the courts will carry into effect an agreement to pay a fixed and stipulated amount of damages, are those where the nature of the damages provided against are not regulated by any rule of law with certainty, and cannot readily be ascertained by a jury.

3. That the five per cent. per month is in the nature of a penalty, and not recoverable.

4. That the legal rate of interest is the measure of damages for non-payment of money.

5. That where the parties agree in the contract upon a rate of interest, that is the legal rate for that contract, and is the measure of damages for its breach. To ascertain the amount to be recovered on this note, compute interest at the rate of three per cent. per month until default, and damages at the same rate, on the principal, till judgment.

FLANDRAU, J. The case below was upon a note made by defendants for one hundred and fifty-one dollars and fifty cents, payable in ninety days from date "with interest at the rate of three per cent. per month payable," and containing this further clause, "and with interest after maturity, upon principal and interest, at the rate of five per cent. per month until paid." The note was drawn payable to the order of one of the defendants, and endorsed by him; it was payable at a certain place, and demanded on the day of its maturity. The defendants appeared and objected to the assessment of damages as follows:—

"To the allowance and assessment of damages by way of interest after maturity of the note for a greater rate and sum than seven per cent. per annum, because there was no law or valid contract warranting the same.

"To the allowance and assessment of damages by way of compound interest after maturity of the note, because there was no law or valid contract warranting the same."

The defendants made other objections, which the conclusion this court has arrived at on those stated will make it unnecessary to notice, as their force was dependent upon the failure of above. The court below overruled the objections of defendants, and they reserved their exceptions; the plaintiffs had judgment for the note, and the increased rate of interest compounded upon the rate stipulated in the note.

The questions presented here are: *First*, is the clause in the note that the rate of interest shall be increased after maturity, one which can be enforced to its full extent? *Second*, if not, what rate of damages does the note draw after maturity? *Third*, can the clause for compound interest be enforced? The very extensive interests depending upon the decisions of these questions, have led the counsel who argued them to make a most thorough and elaborate examination into their merits, and have furnished the court with very learned and able expositions of them from both sides, which have very materially aided in their solution.

The consideration of the first point, as to whether an increased rate of interest can be recovered after the maturity of a contract which bears a stipulated rate, leads naturally to an examination of the law of interest, which I shall do, but necessarily in a more incomplete manner than I would desire, from the limited resources in authorities I have to draw upon.

Prior to the reign of Henry the Eighth, the taking of interest or compensation for the use of money was unlawful in England, and contracts for it were deemed usurious and could not be enforced. It seems to have been held by the church to have been actually sinful as against the laws of God and morality, and by the courts to have been unlawful, from the political reason that money was only a medium of exchange, and naturally barren and unproductive; both of which reasons are equally fallacious when put to the proper test. It never could have been *malum in se* to take money, because the revealed law allows it as between an Israelite and a stranger, and only prohibits it between the Jews; and the prohibition is by no means confined to money but usury among the Jews is prohibited on every article that can be loaned. Deut., ch. 23, 19–20 verses. The political reason, of the natural barrenness of money, making it improper to render it profitable, was untenable, and at variance with the common practice of that day, which allowed profit to be made on many other things quite as barren as money. 2 Bla. Com. 454.

The statute of 37 Henry 8, chapter 9, first fixed the interest of money in England at ten per cent., or rather provided that no more than ten pounds on the hundred shall be taken on a loan. The subsequent stat-

utes on the subject of usury in England, and generally in the states of the Union, have been of this negative character, prohibiting the taking of an amount beyond the rate allowed, not declaring what character of demands shall draw interest, or requiring it to be paid, leaving the question of what shall, and what shall not, draw interest to the contracting parties, or, in other words, making the subject of interest being recoverable or not, dependent upon agreement, and not law, the latter only limiting the amount of the recovery. Such has been the character of the laws on interest, under which the great mass of the judicial decisions involving such questions have been made.

In considering this question, I desire to establish, in the first place, exactly what interest is, and when, and during what period of the existence of the contract it attaches to it, and in doing so I will refer to the case of the *Rensselaer Glass Factory* v. *Reid*, 5 Cow. 587, wherein Senator Spencer, in a very able opinion classifies and arranges the cases on the subject of interest under various heads, and attempts to show that wherever interest is allowed, it is only by reason of an agreement between the parties to that effect. So far as this statement is concerned, there can be no doubt about its accuracy; but I think that case overlooks one great and material distinction which, had it been more accurately observed in the decision of the cases collated by the senator, he would have had less labor to perform; and had he recognized and adhered to it himself, the whole case would have been more in harmony with the great principle which he first asserts, that the recovery of interest must depend on agreement.

The distinction is, that interest, being the creature of contract, is recoverable strictly as interest, only during the continuance of the contract, and as provided by its terms, before breach, and not after. When the agreement is once violated, the promisee has sustained a wrong for which the law gives him redress by way of damages; and whenever the cases have allowed a plaintiff to recover more than the principal sum and the interest up to the time of the breach of the contract, it is solely on account of the default of the party failing; and although in many cases the term interest has been used indiscriminately to designate the accession to the principal by the terms of the contract, and also the amount allowed in consequence of the breach of the contract, yet the distinction is perfect in law, and the synonymous use of the expression interest, with the term damages, has arisen from the fact that wherever the law regulates the amount of interest, that rate becomes the standard of damages on the breach of all money contracts; the result being the same, it is quite natural that the same name should frequently be employed in both cases. The true rule is as expressed by the court in 6 How. U. S. 154: "Everyone who contracts to pay money on a certain day knows that if he fails to fulfill his contract he must pay the established rate of interest, as damages for his non-performance." See also 1 Am. Leading Cases, 498; Sedg. on Dam. 233-4.

Let us see if the analysis and classification of the cases by Senator Spencer, above referred to, would not have been more symmetrical and harmonious, had he recognized the distinction between damages and interest.

He divides the cases where interest is recoverable into two principal heads: *First*, where the agreement for interest is expressed; *second*, where it is implied. He then subdivides the second head into five separate ones, the first and fifth of which alone sustain the idea that it is the implied agreement which allows the interest; the second, third, and fourth being clearly damages for the breach of a contract, and no part of the contract itself. They are as follows in substance: *First*, from custom known to both parties. Here he is evidently treating of the contract before breach. *Second*, "Where the principal is to be paid at a specific time, the law has always implied an agreement to make good the loss arising from a default by the payment of interest." He cites Lord Mansfield, in *Robinson* v. *Bland*, 2 Burr. 1086, and adds: "This proceeds entirely on the idea of a default, and it is a universal maxim, that where interest does not run with the principal, none accrues until a default is made in payment." It is clear that this is an unwarrantable mingling of the ideas of interest which, it is admitted, is the child of contract, with damages which are created by operation of law. Call it damages, and it follows legitimately from the breach of the contract; call it interest, and you are driven to create a contract by implication to sustain it. When a right or a remedy ranges itself as a logical sequence under one class, it much more properly belongs there, and it will conduce to greater accuracy and system to continue it there, than to place it in a category which requires the creation of a fiction to gain it admittance. *Third*, "Where an account has been liquidated by both parties, and the debt therefore becomes due and payable, it carries interest on the same ground of a debt payable at a specific time." The real condition of such an account is, that before liquidation, where the accounts are mutual, or where they are not, the credit is not terminated, the debt is not due until the liquidation takes place, and then it at once becomes the duty of the debtor to pay the balance or amount found due by him, and on default the law makes him pay damages for the breach of the contract to pay; and were there no legal standard of interest to control the damages, they would have to be ascertained in the same manner as damages in any other case are determined, by proof.

The fourth head is similar in principle to the third, and proceeds entirely upon the

breach of the contract to pay when the debt is found to be due. The fifth is confined to cases where an agreement or promise to pay interest, as interest, is clearly implied, by the very acts of the parties, as where charges of interest are made and not objected to, or where interest has, under like circumstances, been allowed by the debtor to other creditors, and the parties act upon the knowledge of the fact. In such cases the contract is clear, and it depends upon the contract and not upon its breach that interest is recoverable.

What places it beyond doubt that the court, in the case in 5 Cow. confused the term interest with the term damages is, that after enumerating the various cases in which interest can be recovered by virtue of a contract expressed or implied, it proceeds to hold that interest may be allowed by a jury in cases of tort, "as trespass or trover for taking chattels," and after citing a large number of authorities, concludes that "all these cases allow interest where there has been fraud, injustice or delinquency." The incompatibility of this idea with the principle that interest can only be recovered by virtue of a contract expressed or implied is manifest; while it consists strictly with the recovery of damages to be regulated in amount by the standard of legal interest.

I have cited the case in 5 Cow. and commented upon it so much at length, because it contains a full collection of the cases on the subject of interest, and damages which are controlled by the rate of interest, and presents, perhaps, the best illustration of the extent to which this synonymous use of damages with interest has been indulged in by the courts. The case in 5 Cow. was decided correctly, as were all the cases cited by Senator Spencer, that I have been able to find, and notwithstanding the difficulty complained of, it is, when studied with that difficulty in view, a most valuable auxiliary to an understanding of the question of interest.

Numerous authorities were cited by the counsel in support of their position, that what is recovered after the maturity of a contract is damages and not interest, some of which I have been able to examine since the argument, and some not, but sufficient to establish the principle. *U. S. Bank* v. *Chapin*, 9 Wend. 471; 6 How. U. S. 154; 4 Pet. 205.

The statute of Minnesota does not in any manner change the nature of interest, but leaves it the creature of contract. Rev. Stat. 155, ch. 35.

The clause in the note in question, "and with interest after maturity, upon principal and interest, at the rate of five per cent. per month until paid," cannot be regarded as a stipulation to pay interest strictly speaking, because the contract into which the parties were entering precludes the idea under the rule above adopted. The contract or promise was, to pay the principal sum on the specified day with interest at the rate of three per cent. per month, and the promise so to do is utterly inconsistent with the position that the parties did not intend to perform, and provided the interest which was to run on a new and different contract, to commence when the first terminated, which is essential to its being interest. The express contract to pay at the certain day must destroy the idea of an agreement not to pay, and a new contract with a new rate of interest to commence; the two propositions cannot stand together. The only intelligible interpretation of the clause is, that the party promising to pay meant to do so, and terminate the contract, and this was expected of him by the promise; and both, knowing that the promise might not be fulfilled, agreed that on default of payment, the promisor should pay, as damages for his breach of contract, the increased rate of five per cent. per month until he paid the note. This, in other words, was an attempt to liquidate the damages for the failure to perform the contract, and I will examine whether the contract was of the nature in which parties may liquidate their damages in advance.

The case of *Bagley* v. *Peddie*, 5 Sandf. 192, contains the rules on the subject of when damages may be liquidated by agreement in advance, and when not, and how such agreements are to be construed, stated in as clear terms as the subject is susceptible of, and as they agree with the conclusions my own researches have produced, I will state them in the language of that case.

"1. Where it is doubtful, on the face of the instrument, whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to the latter."

"2. On the contrary, where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereafter mentioned."

"3. If the instrument provides that a larger sum be paid on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it."

"4. When a covenant is for the performance of a single act, or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any such covenants, that sum is to be deemed liquidated damages, and not a penalty."

"5. Where the agreement secures the performance or omission of various acts of the kind mentioned in the last proposition, together with one or more acts in respect of which the damages on a breach of the covenant are certain, or readily ascertained by a jury, and there is a sum stipulated as damages to be paid by each party to the other for

a breach of any of the covenants, such sum is held to be a penalty merely."

It appears, then, that the only cases in which the courts will carry into effect an agreement to pay a fixed and stipulated amount of damages, are those where the nature of the damages provided against are not regulated by any rule of law with certainty, and cannot be readily ascertained by a jury, and the whole contract must be of this character, because if, on the breach of any one covenant contained in it, the damages are ascertainable by a jury with any degree of certainty, the stipulation will be held to be a penalty to cover the damages on such breach, and cannot be changed to meet the others when the damages are uncertain. The case of *Bagley* v. *Peddie*, above quoted from, was of this kind.

The case of *Smith* v. *Smith*, 4 Wend. 468, was that of one physician selling his business and a lot in a village to another, and covenanting that he would not locate and practice in the village or within six miles of it, and in case he did so locate or practice, that he would pay the plaintiff, on demand, $500 for each month he should so practice, etc., which was held to be of such a nature that the amount stipulated could be recovered.

*Dakin* v. *Williams*, 17 Wend. 446, and reported again in the court of errors where it was affirmed, 22 Wend. 201, was a case where the defendants sold to the plaintiffs a newspaper and the good will of the concern, and covenanted that they would not start another of the same description in the same village or county, and stipulated the damages on a breach at $3,000. It was held that the sum could be recovered. Many other cases are in the books, but the two cited are quite sufficient to illustrate the principle.

Whenever the damages for the breach are susceptible of proof, the stipulation of a certain amount of damages will be held to be a penalty to provide for the actual damages sustained. On this point, see 3 Johns. Cas. 297, with notes "*a*" and "*b*," where many cases are cited; 5 Cow. 144, and very learned note of reporter at the end of case; *Spear* v. *Smith*, 1 Denio, 464, per *Bronson*, C. J. "Where there is an agreement to pay a gross sum in the event of the non-performance of a contract, and the case is such that a jury can ascertain, with reasonable certainty, how much damages the injured party has actually sustained by the non-performance, the courts are strongly inclined to regard the gross sum as a penalty, and not as liquidated damages." *Hoag* v. *McGinnis*, 22 Wend. 163.

"The distinction between a penalty for securing the performance of the contract, and a stipulation which makes part of the contract itself, may be illustrated by the rule, that if a certain rate of interest is reserved on a mortgage, with an agreement that if it be not paid punctually, the rate shall be increased, the larger interest is in the nature of a penalty, and may be relieved against in equity. But, on the other hand, if the larger rate be originally reserved, with an agreement for reduction on punctual payment, the condition for such punctual payment is part of the contract, and relief cannot be given if it is not fulfilled." *Nicholls* v. *Maynard*, 3 Atk. 519; Adams Eq. Am. Notes, [108-9]; 2 Story, Eq. Jur. §§ 1314-15-16-17; *Bonafous* v. *Rybot*, 3 Burr. 1374.

The true reason of the interference of equity in this class of cases, is stated by Chancellor Kent, in his opinion in the case of *Skinner* v. *Dayton*, 2 Johns. Ch. 535. He says, "The true foundation of the relief is, that when penalties are designed only to secure money or damages really incurred, if the party obtains his money or damages he gets all that he expected or required."

The books abound with cases holding this view, and they universally declare the doctrine that where the stipulation is to pay a greater sum, on default of paying a lesser one, no form of words will change it from a penalty to liquidated damages. Such stipulations are by their nature and effect necessarily comminatory, and to allow any arrangement of words to change that effect, would be to permit the parties to override a well fixed rule of law, that the rate of interest shall be the measure of damages.

The case at bar falls distinctly within this latter class; the stipulation is, that if the defendants fail to pay the principal sum of the note with interest on a certain day, they will pay that sum with increased rate of interest upon principal and interest, or in other words, if they fail to pay the lesser sum as agreed they will pay a greater. The greater sum must be held to have been inserted *in terrorem*, and as a penalty. I am unable to find any authority that satisfies me of the propriety of abandoning this long and well settled rule.

There is another reason why this stipulation cannot be regarded in the light of liquidated damages; the greater sum agreed to be paid on breach was evidently not intended to be given or received in lieu of performance of the contract, and in full satisfaction for the breach, which is an essential feature in this character of stipulation. *Gray* v. *Crosby*, 18 Johns. 219; *Slosson* v. *Beadle*, 7 Johns. 72.

This point arrived at, leads us to enquire whether the stipulation to compound the interest can be enforced. Chancellor Walworth, in *Quackenbush* v. *Leonard*, 9 Paige, 345, says: "The principle of not giving effect to a stipulation for the compounding of future interest upon a debt, does not arise from the usury laws. It is merely adopted as a rule of public policy to prevent an accumulation of compound interest in favor of negligent creditors, who do not collect their interest when it becomes due, which negligence is found, in the end, to be an injury, rather than a benefit, to the debtor."

In the case of *The State of Connecticut* v. *Jackson*, 1 Johns. Ch. 13, the master reported his computation of the amount due upon a bond allowing interest upon interest. The report was sent back for correction. In this case the chancellor reviews, in an able manner, the cases on the subject of compound interest from the earliest English decisions, in the reign of Charles the Second, to the date of the case he was deciding; from which review he concludes that the "decisions show the existence of the general principle, and the exceptions and limitations by which it is attended; and though creditors will be very apt to think, with Lord Thurlow, that there is nothing unjust in compelling a debtor, who neglects to pay interest when it becomes due, to pay interest upon that interest, yet the wisdom of our laws has ordained otherwise."

He then shows that the Roman law was constant in its condemnation of compound interest, and establishes, by reasons of the most unanswerable character, that to allow such contracts to be enforced, would be productive of the worst possible evils, harsh and oppressive, and tend to inflame the avarice and harden the heart of the creditor. *Van Benschooten* v. *Lawson*, 6 Johns. Ch. 313, where 1 Johns. Ch. 13, is cited with approbation. *Toll* v. *Hiller*, 11 Paige, 228; *Mowry* v. *Bishop*, 5 Paige, 98; *Boyer* v. *Pack*, 2 Denio, 107, where compound interest, which had been paid under a mistake of fact, was allowed to be recovered back. Hammond's Digest, 331.

There is no limit to the authorities on this point. The principle established is, that a contract to pay interest on interest which is not yet due, is inequitable and will not be enforced; while on the other hand, if the interest is due, it may be added to the principal, and a contract to pay interest on such new principal will be enforced. The only remaining question is, what shall determine the rate of damages the note is to draw after breach?

The statute of Minnesota on the subject of interest is quite peculiar, and must be read with care to be fully understood. Section 1 provides, "Any rate of interest agreed upon by parties in contract, specifying the same in writing, shall be legal and valid." Sec. 2. "When no rate of interest is agreed upon, or specified in a note, or other contract, seven per centum per annum shall be the legal rate."

It is quite clear that the legislature intended to remove all obstacles from the subject of interest, and leave the parties free to contract for such rate as they should consider their money worth; and we will, in examining this statute, be careful to make the distinction between the interest that the parties contract for, and the damages they are entitled to recover on a breach of the contract. The only change, then, that this law of 1851 makes, is to remove the restrictions which previously existed on the right to contract for interest, and repeal all laws then in force on the subject. The counsel for the defendants made a very ingenious argument to show that as the law did not expressly repeal anything, and would only apply to the subject of interest, the old law which fixed the rate of interest, and by reason of such rate, established the measure of damages on money contracts, must be held to be still in force so far as the question of damages was concerned, and still fix the rate. Without discussing the principle, that the main object of the old act being the establishment of a rate of interest, and its being used by the courts, from that fact alone, as a just measure of damages on money contracts, if the main feature should be changed, everything incident to, and consequent upon such main feature, would undergo a corresponding change, it is quite sufficient to state that the counsel was mistaken in fact; the Revised Statutes, of which the interest law is only one chapter of a whole act, contains a provision on p. 578, § 1, which repeals expressly all laws in force either those of the state of Wisconsin or the territory, with certain express reservations, of which the interest law is not one.

I make these remarks on the supposition that there was some statute on interest in force at the passage of the Revised Statutes, as the counsel has cited one, but I have been unable to find the laws of Wisconsin; however, the repealing act which I cite clears the subject of any doubts, and leaves the present interest act as the only statute law in force on the question of interest at the date of this note.

The two sections which compose this chapter on interest stand distinct from, and independent of, each other, and either could be operative alone. The declaration in the first section, that "any rate of interest agreed upon by parties in contract, specifying the same in writing, shall be legal and valid," is merely declaratory of what would be law if nothing was said on the subject, but imposes the condition that the contract shall be in writing. So we see that the only change it makes in the natural right to contract for interest is, that the contract shall be in writing. Suppose, therefore, to test the independency of the two sections, that the second one had not been enacted, and the first one stood alone. In this case, if a contract should be made which simply contained a stipulation to draw interest, without any rate being specified, it would be like any other contract, uncertain in its terms, and would draw no interest, because the law of interest required the rate to be expressed in writing; but after breach there would be no difficulty in recovering damages, because the current value of the money can always be readily ascertained by proof, and such value would be the measure of damages.

Suppose again, that a contract should be made, (the first section standing alone,) in which a rate of interest was specified in writing, and a breach be made by the prom-

isor, what would be the measure of damages? The courts would say the law has permitted the contracting parties to fix a rate of interest to suit themselves, and declared any rate so fixed to be "legal and valid." In a state where the law fixes the rate of interest, it measures the damages by that rate. In this state there is no legal rate of interest, except such as the parties agree upon, and by similar reasoning, that rate should control the measure of damages as being a standard of the value of money adopted by the parties to govern the particular contract in all its aspects, as thoroughly as a statutory standard would produce the same effect.

If section two stood alone upon the statute book, parties would have the same right to contract for interest that they now possess, and the only difference in the law would be, that the contract would be valid without writing, and if no rate of interest was agreed upon, seven per cent. would be the rate of interest, as well as the measure of damages on a breach.

But if the contract specified a particular rate of interest, say three per cent. per month, and a default should be made in the payment, what would be the measure of damages? Certainly not seven per cent., because we have shown that it is the rate of interest, either statutory or agreed, which governs the measure of damages after default, and the second section expressly declares that it is inoperative in the matter of interest as concerns any contract that expresses a rate of interest for itself, consequently it must be equally inoperative upon the measure of damages on the breach of such a contract. Its own words separate it entirely from any contract that specifies its own rate of interest, and confine its influence strictly to those cases where "no rate of interest is agreed upon or specified in a note or other contract."

Where a contract bears interest, and the rate is agreed upon and specified in writing, it falls within the first section of the interest statute, and must be controlled in all its aspects by that section, and as if there was no other provision of law on the subject, because the second section refers to contracts of another and a different nature, to-wit, contracts where "no rate of interest is agreed upon or specified." And on the other hand, where "no rate of interest is agreed upon or specified in a note or other contract," it falls within the second section, and bears seven per centum per annum, and is equally free from any influence whatever from section one, which is confined to a totally different class of instruments. I think there can be very little doubt that the two sections are wholly independent of each other, and that a contract which by its nature falls within the first, cannot be influenced by the last, and *vice versa*.

It is urged that seven per cent. is the general rate of interest established by law, and that the right to contract for a different rate is the exception, and that therefore the general rate is to control the measure of damages; but it seems that the more consistent view of the statute is, that it intended to inaugurate an era of perfect freedom in money dealings, to remove all restraints upon the value of money, and throw the whole subject open to contract; and that the second section was enacted merely to cover those cases of implied contracts to pay interest, and others in which it was expressed, but no rate named, and without which provision the statute would have lacked symmetry and completeness. The emancipation of money was the aim and object of the statute, and the seven per cent. clause was to provide for cases where parties failed to avail themselves of the general privilege.

The only effect that a fixed rate of interest by statute has upon the rate of damages upon the breach of a money contract is, that it furnishes the courts with a standard value of money, which standard is arbitrarily applied as the measure of damages in all such cases. Therefore, where there is no such fixed rate of interest, or standard value of money by statute, the courts must look to some other rule to apply as a measure of damages, and it would seem by far the most reasonable, in harmony with precedent principles, and consistent with the monetary freedom inaugurated by the statute, to adopt such standard value of money as the contracting parties have by virtue of the statute fixed upon for themselves, and not one which it was the principal object of the statute to abolish. The rate of interest by law controlled the damages before the statute; the rate of interest by contract, under the statutes, should perform the same office now.

But we are not without the light of judicial interpretation upon this statute by our own court. In the case of *Brewster* v. *Wakefield*, 1 Minn. [352], the supreme court of the late territory of Minnesota gave the statute the same construction, with the exception that they call the damages which they allow after maturity of the note, interest. Their views on the statute, however, are the same as our own.

The fact that their decision has been made for over two years, and stood as an interpretation of the statute on this point, would be a very strong argument with this court to hold the same way even if we had entertained doubts of the correctness of the reasoning, which we do not. Stability in decisions is of the utmost importance to the progress and well being of a commercial community, and we will always regard it as a weighty consideration in the determination of any question.

The court below erred in allowing the plaintiff to recover the increased rate of interest as damages, and also in allowing the compound interest stipulated in the note. The true rate of damages should have

been the principal sum of the note with interest at three per cent. per month up to the time of default, and damages at the same rate from default to judgment.

The judgment is reversed and the case remanded to the district court of Ramsey county, for retaxation under the rules above established.

(See, also, 1 Pom. Eq. Jur. §§ 381, 433 et seq.; 2 Pom. Eq. Jur. § 826; Snell, Eq. p. 309; Story, Eq. Jur. pp. 637-650; Adams, Eq. p. 107; Newell v. Houlton, 22 Minn. 19; White v. Iltis, 24 Minn. 43; Livingston v. Tompkins, 4 Johns. Ch. 431, Oil Creek R. Co. v. Atlantic & G. W. R. Co., 57 Pa. St. 65; Spear v. Smith, 1 Denio, 464; Gray v. Crosby, 18 Johns. 219; Whitfield v. Levy, 35 N. J. Law, 149; Smith v. Crane, 33 Minn. 144, 22 N. W. Rep. 633; Longworth v. Askren, 15 Ohio St. 370; Thompson v. Hudson, L. R. 4 H. L. 1, Road Co. v. Murray, 15 Ill. 337; Carlon v. Kenealy, 12 Mees. & W. 139; Malcolm v. Allen, 49 N. Y. 448; Smith v. Smith, 4 Wend. 468; Dakin v. Williams, 17 Wend. 447; Green v. Price, 13 Mees. & W. 695; Cushing v. Drew, 97 Mass. 445; Lange v. Werk, 2 Ohio St. 520; Jaquith v. Hudson, 5 Mich. 123; Bagley v. Peddie, 16 N. Y. 469; Kemble v. Farren, 6 Bing. 141, Trower v. Elder, 77 Ill. 452; Berry v. Wisdom, 3 Ohio St. 241; Shreve v. Brereton, 51 Pa. St. 175.)

(As to remedies, see Ropes v. Upton, 125 Mass. 258.)

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(23 Kan. 140.)

## NATIONAL LAND CO. v. PERRY.

(*Supreme Court of Kansas.* July, 1879.)

While contracts for the sale of land in which time is made of the essence of the contract are valid and enforceable at law or in equity, yet, where the circumstances are such that it would be grossly inequitable to enforce a forfeiture, courts of equity will, upon slight ground therefor, relieve a party therefrom, and enforce the contract as merely one of sale. And *held* that, under the circumstances of this case, the district court committed no error in refusing to enforce a forfeiture.

Error from Dickinson district court.

At the March term, 1878, of the district court, Perry had judgment against the National Land Company, which brings the case here.

BREWER, J. In this case is presented one of those harsh time contracts for the sale of land, in which a forfeiture is sought to be enforced for non-payment at the stipulated time. That such contracts are valid, and may be enforced, has already been decided. Missouri River, Ft. S. & G. R. Co. v. Brickley, 21 Kan. 275. The district court decided against the forfeiture. No findings of fact were made, and the only question is whether there was testimony which will sustain such decision. And we are constrained to think that there is. While such contracts are recognized as valid both at law and in equity, yet courts of equity are reluctant to enforce forfeitures when it would be grossly inequitable to do so, and often seize upon slight circumstances to justify a refusal of such forfeitures. Here the land, 160 acres, was sold for $640, one-fifth of which was paid down and possession given. The first year, only interest was due by the terms of the contract, and that was paid. The second year, one-fourth the unpaid principal and the interest became due, and an extension in writing was granted for six months. At the expiration of that time, payment was not made, but tender was made eight days after the date of second annual payment of all amount then due, and interest, and also another tender of the entire amount due on the contract. Both tenders were refused. The land at the time of the sale was vacant and unimproved. There is nothing to show that the price was not the fair value of the land at the time, or that anything had since transpired to affect the value other than the labor and material placed upon it by the vendee. The vendee, during the two years of his possession, had brought the entire tract into cultivation, had at the time of suit sixty acres in wheat, and a hedge-row growing of 160 rods in length. By his labor he had increased the value of the land $992. By the forfeiture, therefore, the vendor was seeking to obtain, not only the cash paid, to-wit, one-fifth the price and the interest, but also $992 of another's labor. He refused to receive the stipulated price and interest, but sought to keep what money he had received, retake the land, and appropriate in addition one and one-half times its value of the vendee's labor. As to these facts, it may be remarked that there is no contradiction in the testimony. Under such circumstances, it would seem to require but little to relieve against the forfeiture.

These facts also appear in the testimony: The first annual payment of principal was due March 10, 1877, and on March 17 the time of payment was extended to September 10, 1877. In September, but whether before or after the 10th does not appear, the vendee sowed sixty acres in wheat. Thereafter he placed a mortgage on the growing wheat for $160, and on December 26th, sold the land to defendant in error, Perry, who assumed the mortgage in part payment. In January, 1878, Perry called on the vendor to obtain an extension of time, and the latter proposed to take up the old contract and execute a new one, with full payment of balance of purchase price in the ensuing fall. He also advised Perry to borrow money and pay off the debt. And on March 18th the tenders heretofore noticed were made.

Now, upon these facts, we think the refusal of the court to sustain a forfeiture cannot be adjudged error.

When the right to a forfeiture accrued, the vendor, for the time being at least, waived it, and granted an extension. And when this further time had expired, he took no steps to enforce the forfeiture, permitted the vendee, if not to bestow labor upon and improve the premises, at least to treat it as

though he had an interest therein, to borrow money upon growing crops, and to sell and receive pay for the land. With full knowledge of this sale, he proposed to the purchaser to throw up the old and take a new contract, and also advised him to borrow money and pay off the debt. Within a reasonable time thereafter the purchaser acts upon the advice, and tenders the money for the debt. It seems to us that the court might properly say, considering all the circumstances, and the gross injustice of any other ruling, that it would not enforce the forfeiture, but give to the vendor his money and to the vendee the land.

We see no other matter requiring notice, or any error prejudicial to the substantial rights of the plaintiff in error.

The judgment will be affirmed.

(All the justices concurring.)

(See, also, 1 Pom. Eq. Jur. § 488 et seq.; Story, Eq. Jur. pp. 644–650, § 1315; Snell, Eq. p. 314; Adams, Eq. p. 110; Atkins v. Chilson, 11 Metc. (Mass.) 112; Palmer v. Ford, 70 Ill. 369; Giles v. Austin, 62 N. Y. 486; Dunklee v. Adams, 20 Vt. 415; Hills v. Rowland, 4 De Gex, M. & G. 430.)

(Time as of the essence of a contract. Missouri River, F. S. & G. R. Co. v. Brickley, 21 Kan. 276, note.)

## V. NOTICE.

### Notice may be either actual or constructive.

(40 Minn. 319, 41 N. W. Rep. 1054.)

BAILEY v. GALPIN.

(*Supreme Court of Minnesota.* March 25, 1889.)

1. Where, in an action to determine adverse claims, the answer denies generally the title of the plaintiff, and by way of new matter sets forth the defendant's title, without alleging the source of plaintiff's title and defendant's prior right, the plaintiff may reply by simply taking issue upon such new matter, without denying notice or alleging superior equities. The pleadings will then simply present the issue of the ownership of the legal title.

2. Where the description of land in a deed is insufficient to pass the title because of the omissions therein made through the mistake of the parties thereto, and, subsequent to the record thereof, the same land is conveyed to a third party, who has no actual notice of the prior deed, the record is not constructive notice to the latter of the equitable rights of the former purchaser.

3. The legal title to land does not pass unless it is so described that it can be identified or located by referring to or following out the description as given.

4. Rules of construction, as applied to the description in deeds, stated.

5. Registration is constructive notice only of what appears on the face of the deed, and of the description of the premises therein, and if in the deed as registered the particular land in controversy is not so described as to identify it with reasonable certainty, the record is not notice to subsequent *bona fide* purchasers.

6. The distinction between constructive notice, legally implied from the fact of registration, and actual notice, as respects the duty of ulterior inquiry, considered.

Appeal by defendant from an order of the district court for Hennepin county refusing a new trial after a trial by *Lochren*, J., and judgment ordered for plaintiffs.

VANDERBURGH, J. This is an action under the statute to determine the adverse claim of the defendant. The complaint contains general allegations of plaintiffs' title and ownership, and that the premises are vacant and unoccupied; that the defendant claims some estate or interest adverse to them, and asks judgment determining it. The defendant appears and answers, denying the plaintiffs' title, and alleging that she acquired title to the land in question by deed from Sykes & Andrews, the owners thereof, on the 11th day of August, 1883, which was recorded on the 23d of the same month. The plaintiffs, in their reply, deny the allegations of new matter in the answer, and thus a complete issue on the question of the legal title was framed by the pleadings. The pleadings did not take the form of a bill and answer in chancery, and, since the answer does not disclose that both parties claim by deed under the defendant's grantor, and that the defendant's was prior in point of time, there was nothing in it necessarily calling for any allegations showing the *bona fides* and superior equities of the plaintiffs under a later deed from defendant's grantors. The parties respectively claim to be the holders of the legal title. *Barber* v. *Evans*, 27 Minn. 92, (6 N. W. Rep. 445.) Upon the trial, however, the plaintiffs voluntarily assumed the burden of proving that they were *bona fide* purchasers without any actual notice of defendant's deed, or of any claim thereto by her, and the court so finds; and this fact must be assumed in disposing of the case in this court.

The record also discloses the following facts in respect to the state of the title: Both parties claim under Sykes & Andrews, the former owners. On the 11th day of January, 1884, the plaintiff Bailey purchased of them the lot in question, viz., lot 12, in block 8, and 11 other lots, described in their deed to him of that date as being "all in Menage's supplement to East Side addition to Minneapolis, according to the plat thereof of record and on file in the office of the register of deeds of said county." A full consideration was paid by Bailey therefor, and the deed was duly recorded upon the next day. Afterwards Bailey conveyed an undivided two-thirds of the lots so purchased to the other plaintiffs. Plaintiffs are the owners of the

lot in controversy (lot 12, in block 8, above described) unless defendant acquired title thereto under the prior deed to her, executed and recorded as set forth in the answer, but in which the plaintiffs claim the description was fatally defective, so that the record thereof was not constructive notice of any title or claim of the defendant to the lot in question described in the deed to them. The description in defendant's deed, which, as before stated, was recorded before the execution of the deed to Bailey, is as follows, viz.: "Lot 12, Bl. 8, Menage's supplement to Minneapolis, according to the plat now on file or of record in the office of the register of deeds in and for said county." As a matter of fact the defendant intended to purchase the lot in question on the date of her deed, and paid for the same, and the grantors, Sykes & Andrews, intended by their deed to her to convey the same lot. The trial court held that the description in the defendant's deed was insufficient to pass the legal title to the lot, although, prior to the plaintiffs' purchase, she had an equity entitling her to a reformation of the deed; and that plaintiffs acquired the legal title; and that the record of defendant's deed, failing to describe the lot, was not constructive notice of her equitable title or claim.

If the plaintiffs had neither actual nor constructive notice, the equities being equal, they, as holders of the legal title, must of course prevail. The legal title to land does not pass by deed unless so described that it can be identified or located by referring to or following out the description as given, and the effect of the record as constructive notice merely cannot be aided or supplemented by proof of the actual intentions of the parties to the deed, not disclosed by the record. *Tice* v. *Freeman*, 30 Minn. 389, (15 N. W. Rep. 674;) *Parret* v. *Shaubhut*, 5 Minn. 258, (323, 331,) (80 Am. Dec. 424.) If the description is sufficient to identify the land, the form adopted is immaterial, whether it be by reference to a plat, or well-known objects, or names or monuments, or by metes and bounds. And where there are several different and complete descriptions of the same land, whether as appearing upon different plats or otherwise, the record of conveyances by either form will be constructive notice, and will bind the title. *Ames* v. *Lowry*, 30 Minn. 283, (15 N. W. Rep. 247.) And so, where the deed or record, in addition to a correct or sufficient description, contains false particulars, the rule is, if there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance false or mistaken will not vitiate the grant. *Thornarth* v. *Armstrong*, 20 Minn. 419, (464;) *Russell* v. *Hayden*, 40 Minn. 88;[1] *Slosson* v. *Hall*, 17 Minn. 71, (95.) It is true that in some instances, where the subject of the grant is identified, mistakes or omissions in the details of the description may be helped by construction. But in such cases the intention of the parties is reasonably clear from the face of the record. *Hoffman* v. *Riehl*, 27 Mo. 554; *Merrick* v. *Wallace*, 19 Ill. 486, 497. In *Partridge* v. *Smith*, 2 Biss. 183, this rule is extended further, perhaps, than is consistent with sound principles, or the current of authority. So, if the description is sufficient to ascertain the estate, although the estate cannot agree with all the particulars, it will pass. But if the description in the deed is so defective and inaccurate that the subject of the grant is not properly identified or indicated, so that a reformation of the instrument is required, the legal title will not pass. *Roberts* v. *Grace*, 16 Minn. 115, (126, 134.)

Here the description is confessedly defective on its face. It is not aided by the addition of particulars containing a correct description or identification, or pointing to it, as might be done, by reference to a previous deed or well-known name or locality, or anything of the kind. "Menage's supplement to Minneapolis" is unknown, and there is no such plat or survey. It is not a description of the land in suit, nor can it be so construed as against *bona fide* purchasers. An expert examiner of titles, who makes it a business to note upon his books all descriptions recorded in the register's office, would of course have discovered this deed, and would prudently place it upon an abstract of the land in question; while a person confining himself to a search of the title of the land described in the plaintiffs' deed would not have occasion to go outside of the lands embraced in the supplement to the East Side addition, and he would not be bound to examine or inquire as to other plats or descriptions not embracing such lands. The description in defendant's deed was not shown or found to be the same or equivalent to the correct description in plaintiffs' deed. We see no reason to question the correctness of the determination of the trial court, that the description was insufficient to pass the legal title.

We come now to consider, in the next place, whether the record of the deed—there being no actual notice—was constructive notice to the plaintiffs of the equitable rights of the defendant, as between her and her grantors, to a reformation of the deed. But this could not well be; for, if the description in the deed is altogether insufficient to locate or identify the property and pass the title, it would not be constructive notice at all to the plaintiffs, and they were not bound to notice it or look for it. *Simmons* v. *Fuller*, 17 Minn. 462, (485, 490;) *Roberts* v. *Grace*, 16 Minn. 115, (126, 135;) Martindale, Conv. § 276 et seq. It is intended that the record should be a correct and sufficient source of information, and the statute did not mean to put purchasers upon further inquiry by virtue of its operation making the fact of registration constructive notice; and parties are understood to purchase upon the

[1] 41 N. W. Rep. 456.

faith of the title as appearing of record. *Frost* v. *Beekman*, 1 John. Ch. 288, 298; *Ledyard* v. *Butler*, 9 Paige, 132, (37 Am. Dec. 379;) *Jackson* v. *How*, 19 John. 80; *Fort* v. *Burch*, 6 Barb. 60, 74. It is the settled rule that registration is constructive notice only of what appears on the face of the deed, and of the description of the premises therein. And if upon the face of the deed as registered the property in controversy is not so described as to identify it with reasonable certainty, the record cannot be notice to subsequent *bona fide* purchasers. *Roberts* v. *Grace*, *supra;* Will. Eq. Jur. *256. Under the registration laws it is sometimes said in a loose and general way that the record of a deed is constructive notice to all the world, but this means simply that the record is open to all, and is notice to interested parties; and, strictly speaking, a purchaser has not by law constructive notice of all matters of record, but only of such as the title deeds of the estate show upon their face, or refer or direct him to. And the *bona fide* purchaser is not constructively bound to look further than the information afforded by the record of such deeds. The record of a deed is notice only to those who are bound to search for it. *Dexter* v. *Harris*, 2 Mason, 531, 536; *Maul* v. *Rider*, 59 Pa. St. 167; *Sanger* v *Craigue*, 10 Vt. 555; *Thomson* v. *Wilcox*, 7 Lans. 376.

The distinction between constructive and actual notice is also to be noticed. Constructive notice of the contents of a deed arises as an inference or presumption of law from the mere fact of record, and is in law equivalent to actual notice of what appears upon the face of the record to the party bound to search for it, whether he has seen or known of it or not; that is, constructive notice under the recording acts may bind the title, but does not bind the conscience; while actual notice binds the conscience of the party. *Underwood* v. *Courtown*, 2 Schoales & L. 41, 66. Hence, where the attention of an interested party is directed to a defective deed or the recorded copy thereof, he may get actual knowledge of the facts sufficient to affect his conscience, and put him upon inquiry, so as to charge him with notice, which would not otherwise be attributable to him from the record only. Thomas, Mortg. § 491. In this case it is only upon the assumption in advance that the plaintiffs knew in fact of the existence of the defendant's deed or the description therein, or were chargeable with notice by the record thereof, that it can be claimed that they were put upon inquiry, or that the title of these lots was bound by it. But they had no actual notice of it. The search made for them did not disclose it. The land was not known by such description. They were not put upon inquiry as to the particulars of the transaction, and they could not be constructively bound by a deed which did not describe the land, and inquiry of the parties to that deed did not become a duty, since they had no notice in fact. *Maul* v. *Rider*, 59 Pa. St. 167. As was said in *Barnard* v. *Campau*, 29 Mich. 162, "in general it will not be disputed that one who seeks a benefit from the recording laws must incur all risks from failure to put his papers duly upon record, whether the fault shall be his own or that of the officer. An equitable construction cannot be placed upon such laws, by which they may be made * * * to give constructive notice of things the records do not show." And in *Frost* v. *Beekman*, *supra*, the chancellor says (p. 299:) "The registry was intended to contain within itself all the knowledge of the deed necessary for the purchaser's safety." The defendant was at fault in not seasonably examining and correcting the description in her deed; and where one of two innocent parties must suffer, the loss ought justly to fall on that one whose error has led to it. *Thomson* v. *Wilcox*, 7 Lans. 376.

Order affirmed.

(See, also, 2 Pom. Eq. Jur. § 591 et seq.; Story, Eq. Jur. § 399 et seq.; Snell, Eq. p. 35; Adams, Eq. p. 151; Pringle v. Dunn, 37 Wis. 449-465; Jones v. Lapham, 15 Kan. 540; Blatchley v. Osborn, 33 Conn. 226; Butcher v. Yocum, 61 Pa. St. 168-171; Lawton v. Gordon, 37 Cal. 202; Curtis v. Mundy, 3 Metc. (Mass.) 405; Stevens v. Goodenough, 26 Vt. 676; Jackson v. Burgott, 10 Johns. 456; Brinkman v. Jones, 44 Wis. 498-518; Cummings v. Finnegan, 42 Minn. 524, 44 N. W. Rep. 796; Williamson v. Brown, 15 N. Y. 354 Hoppin v. Doty, 25 Wis. 573; Raritan, etc., Co., v. Veghte, 21 N. J. Eq. 463-477; Chicago v. Witt, 75 Ill. 211; Reynolds v. Ruckman, 35 Mich. 80; Buttrick v. Holden, 13 Metc. (Mass.) 355; Maul v. Rider, 59 Pa. St. 167-171.)

(Constructive notice. Carleton College v. McNaughton, 26 Minn. 194, 2 N. W. Rep. 688; Moyer v. Hinman, 13 N. Y. 180; Groff v. Ramsey, 19 Minn. 44, Gil. 24; Bank v. Godfrey, 23 Ill. 531.)

(Recitals. Stees v. Kranz, 32 Minn. 313, 20 N. W. Rep. 241; Frye v. Partridge, 82 Ill. 267; Insurance Co. v. Halsey, 8 N. Y. 271.)

## VI. PRIORITIES.

### (a)

**This doctrine rests upon the two maxims that "where there are equal equities the first in time shall prevail," and "where there are equal equities the law shall prevail."**

(3 Hill, 228.)

MUIR v. SCHENCK.

(*Supreme Court of New York.* July, 1842.)

Where there are two equitable claims to the same property which are conflicting the one which is first in order of time will be preferred, and is thus a prior claim.

A bond and mortgage were given by defendant to the plaintiff in the sum of $1,500, to be paid in five installments. When three installments had been paid to the plaintiff, he assigned the bond to D. as collateral security. Afterwards the plaintiff assigned the mortgage and the bond to A., who gave notice to defendant of the assignment, and defendant promised to pay him the money thereon, and did pay him the fourth installment, at one time, and later he paid the balance. After the payment of the fourth installment, and before the payment of the balance, D. gave defendant notice of the assignment of the bond to him, and he himself claimed the balance. The lower court held that the last payment to A. was good, notwithstanding D.'s notice.

*By the court,* COWEN, J. The question is, whether the defendants were right in preferring Austin, and making the last payment to him instead of Doty. Doty had the first assignment from the obligee, and, as between him and Austin, was entitled to the money. In a conflict of equitable claims, the rule is the same at law as in equity, *qui prior est tempore, potior est jure.* There was no need of notice to Austin for the purpose of securing the preference as against him; and Austin might have been compelled at the election of Doty to pay over to him the last installment received from the defendants. But before that installment was paid, he chose to fix the defendants by giving notice of his right to them, and forbidding the payment of any more to Austin. The payments were correctly made to the latter, till notice. The payment afterwards, was in the defendants' own wrong. The notice, when it came, afforded them a complete protection, and had the farther effect to render what was before an inchoate right in Doty, perfect from the beginning. As Austin had never any right to receive, the defendants had now no right to pay. No one would doubt that the first assignment divested the right of the obligee, though the legal interest remained in him. Could he transfer to Austin a greater right than his own? His legal interest was not assignable; and he had parted with all his equitable right. Does it not follow that nothing remained for Austin?

The decision at the circuit, I admit, derives some degree of countenance from the remarks made by Chancellor Kent in *Murray* v. *Lylburn,* (2 *John. Ch. Rep.* 441, 443.) I allude to the view there taken of *Redfearn* v. *Ferrier,* (1 *Dow's Parl. Cas.* 50,) which the learned Chancellor supposed should perhaps be received as a qualification of the rule laid down by Lord Thurlow, in *Davies* v. *Austen,* (1 *Ves. Jun.* 249,) who said: "A purchaser of a chose in action must *always* abide by the case of a person from whom he buys; *that* I take to be an *universal* rule." True, his lordship was speaking of the case of the assignor, as it stood between him and the debtor; yet the same rule has been often applied to a case as between him and one of his previous assignees. Nothing is better settled, for instance, than that the previous assignment of a chose in action will prevent its passing to assignees by a general assignment under the bankrupt or insolvent acts; an assignment carrying even the legal right, and this too, without notice either to the debtor or the subsequent assignees. Ordinarily, any notice to subsequent conventional assignees must be out of the question; for the first assignee cannot know who they will be. Notice to the debtor might, I admit, afford them a better chance; for then there would be one of whom they might enquire, and of whom they naturally would enquire. This might prevent fraud; and, to require it, would therefore perhaps be very proper. It is required by the law of Scotland, as appears by *Redfearn* v. *Ferrier,* which was decided upon the Scotch law. By that law there must be what is called an *intimation* to the debtor, before the assignment is perfect and secures a complete preference even as against a subsequent assignee. In suggesting, however, that such is perhaps the law of England or of this state, Chancellor Kent admitted that he was doing what was not necessary to the decision of the case under his consideration, which turned on a point entirely different, viz. a *lis pendens* operating as constructive notice. In *Livingston* v. *Dean,* (2 *John. Ch. Rep.* 479,) there was actual notice. But neither *Redfearn* v. *Ferrier,* nor the two cases decided by Chan-

cellor Kent, related to a previous express assignment. There was scarcely the semblance of such an assignment, but only a trust to be inferred by the court of chancery from circumstances—a sort of implied trust—a creature peculiar to that court. The prior right claimed, was spoken of as a latent equity. As between express assignments, I take the law to be correctly laid down by Parker, C. J. in *Wood* v. *Partridge*, (11 *Mass. Rep.* 488, 491, 2.) He said: "Between assignor and assignee the contract is complete without any notice to the debtor;" and he considered the notice as intended to protect the debtor alone. Story, J. in his learned work on the *Conflict of Laws*, (*p.* 328 *to* 330,) mentions the difference between the Scotch law and our own, admitting the necessity of *intimation* in the former. He says, that according to our law, an assignment operates, *per se*, as an equitable transfer of the debt, and he concedes that notice is necessary to protect the debtor; adding: "But an arrest or attachment of the debt in his hands by any creditor of the assignor, will not entitle such creditor to a priority of right, if the debtor receive notice of the assignment *pendente lite*, and in time to avail himself of it in discharge of the suit against him." That has been held in several cases. (*Bholen* v. *Cleveland*, 5 *Mason* 174, 176; *Foster* v. *Sinkler*, 4 *Mass. Rep.* 450; *Dix* v. *Cobb. id.* 508.) In *Wood* v. *Partridge*, this question between a previous assignee and a subsequent attaching creditor, was considered the same in principle as that between conflicting assignees. It is undoubtedly so. The principle has been declared by other cases. (*White's heirs* v. *Prentiss' heirs*, 3 *Monroe*, 510; *Madeira* v. *Callett*, 7 *id.* 477.) In *Jordan* v. *Black*, (2 *Murph.* 30,) the claim of the assignee presented a very strong equity. Hall, J. said, in substance that, "upon an examination of the authorities it would be found that the ground taken by the assignee of being a *bona fide* purchaser, is tenable by those persons only who have the *legal title* in them, and plead that they are purchasers for a valuable consideration without notice. By this plea they show that they have as much equity on their side as their opponents; and that being the case, a court of equity will not interfere and divest them of their *legal title*. All that the assignee shows is, that she purchased the assignor's right to a chose in action. She has no *legal*, but only an *equitable* title."

No fraud upon Austin's rights is imputable to Doty. He entertained a confidence that the assignor would pay his claim, and that he should therefore not find it necessary to take measures for collecting the bond. He gave notice to the defendants as soon as he found himself disappointed.

Nor is it any answer to Doty's claim, that the defendants promised to pay Austin. It is said truly, that this, in an ordinary case, would have entitled him to an action in his own name. *Prima facie* it brought him within the rule, that an assignee of a chose in action may sue in his own name, on an express promise by the debtor to pay him.(*a*) This arises from *consideration* and privity; but in the case at bar, the assignment to Austin having failed of effect by reason of the prior assignment to Doty, there was no consideration for the promise. The case is the same as if Austin had held no assignment even in form. The last payment by the defendants was, therefore, made in their own wrong; and there must be a new trial, the costs to abide the event.

New trial granted.

(*a*) See *Jessel* v. *The Williamsburgh Ins. Co.*, (3 Hill, *p.* 88, 9,) and the cases there cited.

(See, also, Adams, Eq. p. 141; 1 Story, Eq. Jur. pp. 567, 569; 2 Pom. Eq. Jur. § 682 et seq.; Bovey v. Smith, 1 Vern. 144; Mackreth v. Symmons, 15 Ves. 329; Ferrars v. Cherry, 2 Vern. 383; Coles v. Sims, 5 De Gex, M. & G. 1-8; Stees v. Kranz, 32 Minn. 313, 20 N. W. Rep. 241; Whitney v. Railroad, 11 Gray, 359-364; Barron v. Richard, 8 Paige, 351; Trustees v. Lynch, 70 N. Y. 440; Palmer v. Williams, 24 Mich. 329; Schoch v. Birdsall, (Minn.) 51 N. W. Rep. 382; Stewart v. Smith, (Minn.) 30 N. W. Rep. 430; Jacoby v. Crowe, 36 Minn. 93, 30 N. W. Rep. 441; Banning v. Edes, 6 Minn. 402, Gil. 270.)

## PRIORITIES.

(*b*)

(25 N. J. Eq. 416.)

FOX v. PALMER.

(*Court of Chancery of New Jersey.* October, 1874.)

Where P. gave a defective mortgage to F., which constituted an equitable lien upon certain land, but did not convey the legal title thereto, and afterwards gave another conveyance of the same land which did convey the legal title, *held*, that the equities of the last purchaser must prevail, as they are supported by the legal title.

THE VICE-CHANCELLOR.

The mortgage sought to be foreclosed in this suit, was put upon record after the mortgaged premises had been conveyed by the mortgagor to his daughter, and the complainant seeks to enforce his mortgage lien on the ground that the daughter was not a *bona fide* purchaser for value without notice.

Joseph Palmer, the mortgagor, was, at

the date of the mortgage, November 30th, 1870, the guardian of Ella L. Palmer, his daughter, then a minor between nineteen and twenty years old, and possessed of personal property, consisting of stocks, bonds and money in Savings Bank, amounting in all to something less than $10,000. Her sister was the wife of Oscar F. Lund, and all of them resided in Jersey City. Lund was engaged in various transactions with William E. Rogers, a practicing lawyer in Jersey City, with whom he was operating in different ways that involved the raising or borrowing of money. Through the agency of Rogers and Lund, the premises in controversy, being real estate in Jersey City, were bought and conveyed to Palmer. They were conveyed to Palmer by Edward Dunn, for about $4,000, in or about October, 1870.

The mortgage in question was signed by Palmer, in blank, and taken by Lund to Rogers. No bond is produced, but I think it sufficiently appears from the evidence, that Palmer signed a blank bond, together with the mortgage. The blank bond and mortgage were filled in with amounts and dates by Rogers, or under his direction, and were taken by Rogers and Lund to John M. Fox, the complainant, then a broker in New York, who procured, he says, from Frank W. Harris, an operator in New York, to whom the bond and mortgage are drawn, the sum named in them, to wit, $3250, and paid it over to Rogers and Lund, less his charges and fees. The bond and mortgage were afterwards assigned to Fox, who relied upon Rogers, as his attorney, to have the mortgage recorded. Rogers neglected or omitted to have it recorded till May 25th, 1871.

While the negotiations for the purchase of the property from Dunn were going on, and payments being made for it, the securities of Ella L. Palmer were made use of by her guardian, together with Lund, for the raising of money; and in April, 1871, Ella being aware of the fact, and anxious to be paid or secured, took a conveyance of the premises from her father, which was recorded on the 13th of May, 1871.

The particulars of the foregoing transactions, thus generally stated, have been testified to in whole or in part by Ella, her father, Fox, Harris, Lund and Rogers. It is difficult to say with confidence, in view of the looseness and inaccuracy of much of the testimony and the contradictory statements of the witnesses, what the true particulars are. My conclusion upon the whole case is, that the conveyance to Ella should be sustained, and the complainant's bill dismissed, but without costs. I think it cannot be doubted that the mortgage signed in blank by Palmer and afterwards filled in by Rogers, was not a valid legal deed. The most that can be claimed for it is, that it is an equitable lien on the premises, which this court can, under proper circumstances, enforce. But, if admitted to be an equitable lien, it cannot prevail against the equitable rights of Ella, who has also the title by law. I think it altogether probable, if indeed the evidence does not prove, that the premises were purchased with the proceeds of her securities. There is some indefiniteness as to amounts, but I think there can be little doubt that the full amount paid for the property was in fact hers. It is proved that she had no notice of the mortgage. There is nothing, so far as I am able to see after carefully examining the evidence, which would justify me in saying that her legal title is fraudulent, or that her deed should be decreed to be a security in the nature of a mortgage, either subsequent or prior to the mortgage of the complainant.

I shall, therefore, advise that the bill be dismissed. In view of the conduct of Palmer, enabling this mortgage to be made use of to raise money, I think it a case where costs should be denied for his answer, and also, generally, as against the complainant.

(See, also, 2 Pom. Eq. Jur. § 682 et seq.; 1 Story, Eq. Jur. pp. 63-65; Snell, Eq. p. 23; Phillips v. Phillips, 4 De Gex, F. & J. 208; Newton v. McLean, 41 Barb. 285; Downer v. Bank, 39 Vt. 25; Brown v. Welch, 18 Ill. 343.)

(See, also, cases cited under "Maxims 6 and 7.")

## VII. BONA FIDE PURCHASERS.

**To constitute a person a bona fide purchaser three things are necessary: First, a valuable consideration; second, absence of any notice of the rights of others in or to the subject-matter; and, third, good faith on the part of the purchaser.**

(49 N. Y. 286.)

WEAVER v. BARDEN.

(*Court of Appeals of New York.* 1872.)

ALLEN, J. The plaintiff furnished the consideration for the transfer of the shares of stock from Finch, the original owner, the same having been made in satisfaction of a debt due him from the assignor. The stock was transferred into the name of a son of the plaintiff, who was also a son-in-law of the defendant, without the knowledge or consent of the plaintiff, who had no knowledge that the transfer had been made in that form until some time in 1864, long after the transfer by the son to the defendant. The son, at the time of the transfer by Finch, was, in the language of the report of the referee, "to some extent the agent of the plaintiff in New York."

The stock was transferred by the son of the plaintiff to the defendant in January, 1860, "in part payment of an indebtedness from said Llewellyn (the son) to defendant of over $2,500;" and "the defendant at the same time sold and delivered to said Llewellyn 280 pounds of butter, at twenty cents per pound, amounting to seventy dollars, which was a part of said indebtedness, paid in part as aforesaid." "Such purchases of said stock were made by defendant's son, acting as his agent; and the sum of $520, the amount agreed upon as the value of said stock, was, by the defendant, credited upon the indebtedness of said Llewellyn by the defendant."

The evidence is that the butter was sold to the assignor of the stock on the third of January, 1860, and the stock was transferred the day following.

The account between the defendant and Llewellyn Weaver was made an exhibit by the defendant, and discloses a long account, commencing in 1852; the last item on the debtor side of which is the charge of seventy dollars for the butter; and the first item on the credit side is the sum of $520 for the shares of stock.

The transaction was simply a transfer of the shares of stock by Llewellyn Weaver, and a subsequent entry by the defendant, in his books, of the credit for the purchase-price. No security was surrendered, and no voucher given.

The defendant parted with nothing as a consideration for the transfer.

The capital stock of an incorporated company is personal property; and it has not, neither has the certificate or other evidence of title or ownership, any of the qualities of commercial or negotiable paper.

As a rule, the purchaser or assignee of shares of the capital stock in a corporation acquires no other or better title than the seller or assignor has, and takes it subject to the legal and equitable rights of third persons. The rightful owner may be estopped by his own acts from asserting his title, as he may be in respect to other property of a like character. If he has invested another with the usual evidence of title, or an apparent authority to dispose of it, he will not be allowed to make claim against an innocent purchaser dealing upon the faith of such apparent ownership and *jus disponendi*. (*Denton* v. *Livingston*, 9 J. R., 96; *Howe* v. *Starkweather*, 17 Mass., 244; *McNeil* v. *Tenth Nat. Bank*, lately decided in this court and not reported [46 N. Y., 325—Rep.]; *Arnold* v. *Ruggles*, 1 R. I., 165.) The plaintiff, the owner in fact of the stock in controversy, did not give to another the external evidence of authority to dispose of it, and did not assent to placing the property, or the evidence of property, with his son.

Whatever was done in the way of divesting the plaintiff of his property, was done in fraud of his rights and without his consent.

An unauthorized sale, although for a valuable consideration and without notice, vests no higher title in the vendee than was possessed by the vendor. (*Prescott* v. *De Forest*, 16 J. R., 159; *Wheelwright* v. *Depeyster*, 1 id., 471; *Williams* v. *Merle*, 11 W. R., 80; *Brower* v. *Peabody*, 3 Ker., 121; *Covill* v. *Hill*, 4 Den., 323). The property in the capital stock of a corporation is not distinguishable from other personal property; and the owner cannot be divested of his property except by his own voluntary act and consent, or by some act which would be effectual to give title as against him to other movable property and choses in action.

The plaintiff is not estopped, as against the defendant, upon the evidence or the findings of the referee, from asserting his title to the stock and the dividends upon it. The original title of the plaintiff is conceded, and the defendant seeks to make title under one who had no legal title or authority to transfer, but the evidence of title acquired by fraud and without the authority or assent express or implied of the plaintiff. Such a title cannot avail against the rightful owner.

(*Pollock* v. *National Bank*, 3 Seld., 274.) The only doubt or difficulty as to the right of the plaintiff to recover, conceding all that is claimed in behalf of the defendant, to wit, that he is a *bona fide* purchaser for value, without notice of the title and claim of the plaintiff, grows out of the fact that the legal evidences of title never were in the plaintiff, the title having been transferred without fault of the corporation directly from Finch to Llewellyn Weaver, and from the latter to the defendant. It is not the case of a transfer under a forged power of attorney or by a person of the same name as the rightful holder of the stock. A party could not be divested of the title to his property by such means, and would have a remedy over against the corporation permitting the transfer, or might follow his stock and reclaim it from the transferee. (See *Davis* v. *Bank of England*, 2 Bing., 393; *Sewall* v *Boston Water Power Company*, 4 Allen, 277; *Duncan* v. *Luntley*, 2 McN. & G., 30.)

The plaintiff here has no remedy against the corporation for permitting the transfer and issuing the new certificates to the son of the plaintiff. The corporation was not careless or negligent in the transaction, and no wrongful act was committed by its officers.

At the time of the transfer to the defendant his assignor was insolvent and continued so until his death. The only remedy, therefore, of the plaintiff is to follow his stock into the hands of the defendant, and reclaim it, with the dividends, upon the strength of his superior title, and he is entitled to recover unless the defendant is a purchaser for a valuable consideration and in good faith. In *Crocker* v. *Crocker*, 31 N. Y., 507, the claimant and rightful owner of the stock had conferred the apparent right of property in bank stock upon a third party who had abused his confidence, and yet was allowed to recover except as against a purchaser in good faith and for a valuable consideration for an advance made on the faith and security of the stock.

The referee, upon the facts found, held that the defendant was the owner of the shares in good faith and for a valuable consideration paid by him therefor, and the complaint was dismissed on that ground.

The plaintiff was defeated on the ground that the defendant had acquired a title superior in equity to that of the plaintiff by a purchase in good faith without notice of the claim or of any defect in the title and for a valuable consideration paid. The referee was clearly right in his views that a purchase, without notice of the plaintiff's claim alone, would not protect the defendant, and that something more than a good consideration, a consideration which would be sufficient as between the parties to the transaction, was necessary to shield him against the claim of the plaintiff.

He recognized the rule that the consideration must be valuable and actually paid, and that the defendant must have parted with value upon the faith of the purchase, and his error was in regarding the credit of the purchase price in his books to the account of the assignor as a "valuable consideration paid."

In speaking of a consideration which is to protect against prior and latent equities, the terms "price paid" and "valuable consideration" are used as convertible terms. (*Willoughby* v. *Willoughby*, 1 T. R., 763, 767.) To entitle a purchaser to the protection of a court of equity, as against the legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration, that is, for value paid.

Where a man purchases an estate, pays part and gives bond for residue, notice of an equitable incumbrance before payment of the money, though after giving the bond, is sufficient. (*Tourville* v. *Naish*, 3 P. Wms., 306; *Story* v. *Lord Windsor*, 2 Atk. 630.) Mere security to pay the purchase price is not a purchase for a valuable consideration. (*Hardringham* v. *Nicholls*, 3 Atk., 304; *Maundrell* v. *Maundrell*, 10 Ves. 246-271; *Jackson* v. *Cadwell*, 1 Cow., 622; *Jewett* v. *Palmer*, 7 J. C. R., 65.) The decisions are placed upon the ground, according to Lord HARDWICKE, that if the money is not actually paid the purchaser is not hurt. He can be released from his bond in equity. Chancellor WALWORTH lays down the rule as follows: "To entitle a party to the character of a *bona fide* purchaser, without notice of a prior right or equity, such party must not only have obtained the legal title to the property, but he must have paid the purchase-money, or some part thereof, at least, or have parted with something of value upon the faith of such purchase before he had notice of such prior right or equity." (*De Mott* v. *Starkey*, 3 Barb. Ch. R. 403; and see *Caldwell* v. *Bartlett*, 3 Duer, 341; *Keyser* v. *Harbeck*, id., 373.) In *Root* v. *French*, (13 W. R., 570), it was held that while a transfer of goods by a fraudulent buyer to a purchaser in good faith, and who gave value for them, that is, paid for them at the time of the transfer, made advances upon them, incurred responsibilities upon the credit of them, or received them in pledge for money or property loaned upon the strength of them, might hold the goods against the seller, the original owner who had been defrauded of them, that a transfer of the goods to a *bona fide* creditor of the fraudulent purchaser in payment of a pre-existing debt did not constitute the creditor a *bona fide* purchaser for a valuable consideration. *Buller* v. *Harrison* (Cowp., 565) was cited with approval, in which it was held that the mere passing money to the credit of another, where there is no new credit given, nor acceptance of new bills or sum advanced in consequence, it was not a payment. The situation of the party was not changed, and he had parted with nothing. That is all that was done by the defendant here. The same principle is affirmed

in *Padgett* v. *Lawrence* (10 Paige, 170), the chancellor holding that the purchaser of the legal title to property who receives a conveyance thereof merely upon the consideration of a prior indebtedness of the grantor is not entitled to protection as a *bona fide* purchaser, without notice of a prior equity of a third person therein. But the relinquishment of a valid security which the purchaser before held for his debt, and which cannot be recovered, so as to place him in the same situation substantially as to security as he was in prior to his purchase, may entitle him to such protection. This case is cited with approval in *Peck* v. *Mallams* (6 Seld., 545). This court, in *Wood* v. *Robinson* (22 N. Y., 564), held that a mortgagee who had taken a mortgage to secure a precedent debt was not entitled to protection against a prior latent equity. Nothing was advanced at the time, and no security was given up, neither was there any definite contract for extending the credit on the demands held by the creditor. Judge DENIO lays down the proposition broadly, and all the judges concurred: "When a conveyance is made, or a security taken, the consideration of which was an antecedent debt, the grantee or party taking the security is not looked upon as a *bona fide* purchaser;" and again, "it is well settled that a grantee or incumbrancer who does not advance anything at the time, takes the interest assigned subject to any prior equity attaching to the subject." The doctrine that a valuable consideration is necessary to create a defence against prior equities, is the doctrine of courts of equity in other States and in England, as applied to the transfer of real or personal property, and choses in action other than negotiable instruments. The only difficulty has been in determining what is a "valuable consideration."

It is generally admitted that the mere existence of a precedent debt is not a sufficient consideration to support a conveyance as against prior equities; but in some States it is held that when made in absolute payment and satisfaction of an antecedent debt, the purchase will be regarded as a purchase for value. But that is not the rule in this State. (*Dickerson* v. *Tillinghast*, 4 Paige, 215.)

In this State the rule has been applied to the transfer of bills of exchange and promissory notes, and the party taking them in payment of or as security for an antecedent debt when no new credit is given, security surrendered or obligation incurred, has not been regarded as a *bona fide* holder for value as against third persons having prior equities, but the decisions have not been in entire harmony with those of the Supreme Court of the United States and some of our sister States. The rule as applied to negotiable instruments in this State has been criticised and quarreled with by individual judges, but whenever it has come directly in judgment, the doctrine, as first announced in *Coddington* v. *Bay* (20 J. R. 637), has been adhered to. The claim to distinguish between commercial instruments and other choses in action and property interests has been based upon the supposed interests of commerce, and the necessity of giving the freest circulation to instruments so generally used in commercial transactions. Bills of exchange and promissory notes do constitute in a great measure the medium of exchange between merchants and take the place of money, and they pass from hand to hand transferable by indorsement or mere delivery, and many have thought that it would have been better if, in all cases of transfer of that class of instruments in good faith and in the ordinary course of business and upon a sufficient consideration as between the parties, the same had been held valid, and to have vested a good title in the transferree, *Bay* v. *Coddington* (5 J. C. R., 54), affirmed in the Court for the Correction of Errors (20 J. R., 637), was to the effect that to give title as against the rightful owner of commercial paper fraudulently transferred, it must be received by the transferree not only in the ordinary course of business and without notice, but also for a present value, for a fair and valuable consideration given or allowed at the time, that credit must be given to and value parted with on the strength of the identical paper, and that a past consideration or antecedent debt or liability was not sufficient. A mere receipt of a bill or note in payment of or as security for a precedent debt has never, in this State, been held sufficient to protect the title of the holder as against the equities of third persons, and some new credit must be given, new advance made, or some prior security parted with, or a debt absolutely satisfied and extinguished, in order to complete the title of the holder. (See cases cited in *Farrington* v. *Frankfort Bank*, 24 Barb., 554.)

In this court the rule has not been departed from; on the contrary, it has been recognized and followed in *Youngs* v. *Lee* (2 Ker., 551); *Boyd* v. *Cummings* (17 N. Y., 101); *Essex County Bank* v. *Russell* (29 N Y., 673); *Brown* v. *Leavitt* (31 id., 113). BROWN, J., in *Bank of New York* v. *Vanderhorst*, (32 N. Y., 553), says: "The rule is, that if the holder parts with anything of value, money, property or existing securities, at the time he receives the note, and upon the faith of its being paid, he is *ipso facto* clothed with the attribute of a holder for value." In that case the plaintiff had taken the note in controversy as a collateral security for a loan made at the time upon another note and the bank was held to be a holder for value. In *Lawrence* v. *Clark*, (36 N. Y., 128), it was decided that a party receiving a note on a precedent debt, without surrendering or relinquishing any security or right respecting it, is not a *bona fide* holder of the same. The note, before it fell due, had been transferred "by the payees to the plaintiff," who received and accepted it upon and in part payment of a prior existing indebtedness "of the payees to them." *Bay* v. *Codding-*

*ton; Farrington* v. *Frankfort Bank, supra; Rosa* v. *Brotherson* (10 W. R., 85), and *Payne* v. *Cutler* (13 id., 605) were cited with approval, and the doctrine that a creditor receiving the transfer of a negotiable note in payment of a precedent debt without giving up any security, takes it subject to all equities existing between the original parties, reasserted. (See, also, *Chrysler* v. *Renois*, 43 N. Y., 209.) Here the defendant parted with or surrendered no security, and his situation was, in no respect, changed by the transaction, and if the title which he acquired is to be determined by the very liberal rules which, in view of the convenience if not the necessities of commerce, have been established in respect to negotiable instruments, the defendant is not to be regarded as a holder for value so far as the assignment was received in part payment of the precedent debt. If the butter was sold upon the faith of the transfer of the stock, the defendant would be entitled to be repaid that amount before reconveying the stock.

He would be entitled to a lien for the price of the butter.

The Supreme Court properly reversed the judgment of the referee, but it was not a case for judgment absolute for the plaintiff. A new trial should have been awarded.

So much of the judgment of the Supreme Court as gives judgment for the plaintiff is reversed and a new trial is granted, costs to abide event.

(See, also, 2 Pom. Eq. Jur. § 745 et seq.; Story, Eq. Jur. § 1502; Snell, Eq. p. 25; Willoughby v. Willoughby, 1 Term R. 763, 767; Maundrell v. Maundrell, 10 Ves. 246, 260, 270; Jones v. Powles, 3 Mylne & K. 581, 597, 598; Briscoe v. Ashby, 24 Grat. 454; Hamman v. Keigwin, 39 Tex. 34; Roseman v. Miller, 84 Ill. 297; Everts v. Agnes, 4 Wis. 343; Palmer v. Williams, 24 Mich. 328; Wood v. Chapin, 13 N. Y. 509; Cary v. White, 52 N. Y. 138, 142; Worthy v. Caddell, 76 N. C. 82; Westbrook v. Gleason, 79 N. Y. 25-36.)

(Antecedent debt. Stevenson v. Hyland, 11 Minn. 198, (Gil. 128;) Frey v. Clifford, 44 Cal. 335; Baldwin v. Sager, 70 Ill. 503; Jewett v. Palmer, 7 Johns. Ch. 65; Osborn v. Carr, 12 Conn. 195; Partridge v. Chapman, 81 Ill. 137; Hull v. Swarthout, 29 Mich. 249.)

## VIII. ESTOPPEL.

### Estoppel rests upon the principle that "he who would have equity must do equity."

(41 Minn. 165, 42 N. W. Rep. 870.)

DOBBIN v. CORDINER.

(*Supreme Court of Minnesota.* July 2, 1889.)

1. A married woman who, at her husband's request, executes and acknowledges a deed of conveyance of real property, knowing it to be such, and allows her husband to take it away for delivery to a purchaser, is estopped, as against an innocent purchaser under the deed, to assert that the deed was invalid because, when she executed it, no grantee was named in it, or because she did not know that the land described in the deed was her own and not her husband's land, she not having read the deed, nor having shown sufficient excuse for not reading it.

2. The capacity of married women to be bound and estopped by their conduct is incident to their enlarged power to deal with others.

3. A deed is effectual as a conveyance, although there was but one subscribing witness. Following *Morton* v. *Leland*, 6 N. W. Rep. 378, 27 Minn. 35; *Johnson* v. *Sandhoff*, 14 N. W. Rep. 889, 30 Minn. 197, and *Conlan* v. *Grace*, 30 N. W. Rep. 880, 36 Minn. 276.

Appeal by plaintiff from a judgment of the district court for Hennepin county, where the action was tried by *Baxter, J.*, (acting for a judge of the fourth district.)

DICKINSON, J. This action is prosecuted for the purpose of securing the cancellation of a deed of conveyance from the plaintiff and her husband to the defendant. The plaintiff seeks to avoid the deed upon the grounds that, as she alleges, the deed, when executed by her, was incomplete, not containing the name of the grantee nor any description of the property conveyed; that, by her husband's misrepresentations, she was induced to sign and acknowledge the instrument in its incomplete form; and that he afterwards, without her authority, inserted the name of the defendant as grantee, and the description of the property, and delivered the deed to the defendant. By the findings of the court the following facts are established: The land had been purchased by the plaintiff's husband, who paid a part of the purchase price. The conveyance was made to the plaintiff, who gave a mortgage upon the property for an unpaid part of the purchase price. The plaintiff's husband, having bargained with the defendant for the sale of the land to him, prepared a deed for the conveyance of the property, complete in form, except that it did not contain the name of any grantee. He requested the plaintiff to execute it; and, without objection, she signed and acknowledged it, the husband also joining in the execution of it. She delivered the deed, after her acknowledgment, to her husband, for the purpose of completing and delivering it to the purchaser. The husband then wrote in the name of the defendant as grantee, delivered it to him, and the latter, receiving the deed, paid the price to plain-

tiff's husband, in good faith, without notice of any defects or omissions in the making or executing of the deed. He assumed, as part of the consideration, the payment of the outstanding mortgage on the property. The plaintiff's allegations as to the fraudulent procuring of her execution of the deed are not sustained by the findings of the court.

It is conceded on the part of the appellant, the plaintiff, that, in general, one executing a deed of conveyance may give authority to another, by parol, to insert in the deed, after its execution, the name of a grantee, the grantee not having been before named in the deed; but it is contended that a wife cannot confer such authority upon her husband. We deem it unnecessary to decide whether this distinction can be recognized. Without regard to that question, and however it might be decided, we are of the opinion that by her conduct the plaintiff is precluded, upon the principle of estoppel, from asserting, as against the defendant, the invalidity of this deed. Our statutes have gone far to remove the common-law disabilities of married women. The property held by them at the time of their marriage continues to be their separate property after marriage. They may, during coverture, receive, hold, use, and enjoy property of all kinds, and the rents, issues and profits thereof, and all avails of their contracts and industry, free from the control of their husbands. They are capable of making contracts by parol or under seal. They are bound by their contracts, and responsible for their torts, and their property is liable for their debts and torts, to the same extent as if they were unmarried. Their power to contract, and to convey real estate, is, however, so far qualified that they cannot contract with their husbands relative to the real estate of either, or by power of attorney or otherwise authorize their husbands to convey their real estate or any interest therein; and, in general, in all conveyances by married women of their real estate, their husbands must join. Married women cannot enjoy these enlarged rights of action and of property and remain irresponsible for the ordinary legal and equitable results of their conduct. Incident to this power of married women to deal with others is the capacity to be bound and to be estopped by their conduct, when the enforcement of the principle of estoppel is necessary for the protection of those with whom they deal, although there are, without doubt, limitations upon the application of this doctrine. *Norton* v. *Nichols*, 35 Mich. 148; *Reed* v. *Morton*, 24 Neb. 760, (40 N. W. Rep. 282;) *Knight* v. *Thayer*, 125 Mass. 25; *Bodine* v. *Killeen*, 53 N. Y. 93; *Powell's Appeal*, 98 Pa. St. 403; *Fryer* v. *Rishell*, 84 Pa. St. 521; *Godfrey* v. *Thornton*, 46 Wis. 677, (1 N. W. Rep. 362;) *Lavassar* v. *Washburne*, 50 Wis. 200, (6 N. W. Rep. 516;) *Baum* v. *Mullen*, 47 N. Y. 577; *Patterson* v. *Lawrence*, 90 Ill. 174; *Reis* v. *Lawrence*, 63 Cal. 129; *Sharpe* v. *Foy*, L. R. 4 Ch. App. 35; *In re Lush's Trusts*, Id. 591; 2 Pom. Eq. Jur. § 814.

This plaintiff had power to convey her estate by deed in which her husband should join. She executed and acknowledged this deed, knowing that it was a deed of conveyance, and contemplating that it was to be delivered and have effect as such, and that the purchaser would pay a consideration therefor. The deed was delivered, as she intended it should be, to a purchaser, who, in good faith, supposing the conveyance to be in all respects valid and effectual, has paid the consideration therefor. Even if her authority to her husband, implied from the circumstances, to fill in the name of the grantee was ineffectual to legally empower him to do so, she ought not now to be allowed, in a court of equity, to defeat the title of the purchaser upon that ground. A grantor not under disability from coverture, would be estopped under such circumstances. *Pence* v. *Arbuckle*, 22 Minn. 417. It is equitable that the same principle be applied here for the protection of the defendant; and to so apply it does not, we think, defeat the purposes of the statute declaring invalid any power of attorney or other authority, as between husband and wife, to convey real estate. It is immaterial, in our view of the case, whether or not there was an express authorization of the husband to fill in the name of the grantee. It is enough that the plaintiff intended the instrument to have effect as a conveyance, and that she allowed her husband to take it, after she had executed it, for the purpose of delivering it to the purchaser as a deed of conveyance executed by her. That the plaintiff supposed that her husband was to deliver this deed to the purchaser is shown by her own testimony. The extent of the proof on the part of the plaintiff, as to the misrepresentation of her husband, was that he said to her, when he asked her to execute the deed, that he would like to sell a lot. Without considering what might have been the effect of fraudulent misrepresentations of the husband in a case where the wife was not chargeable with negligence in the transaction, we regard this evidence as wholly insufficient to justify the granting of relief as against an innocent purchaser. With regard to the rights of purchasers it was culpable negligence on the part of the plaintiff to execute the conveyance unless she is to be bound by it. The language of her husband did not justify her in executing the deed without reading it, or at least without more definite information as to its contents, unless she was willing to allow the deed to have effect whatever the property conveyed might be. It is therefore unnecessary to pass upon the question of the admissibility of the husband's testimony going to rebut the plaintiff's testimony in this particular, and which, as it seems, the court below did not consider.

The deed was effectual as a conveyance, although there was but one subscribing wit-

ness. *Morton* v. *Leland*, 27 Minn. 35, (6 N. W. Rep. 378;) *Johnson* v. *Sandhoff*, 30 Minn. 197, (14 N. W. Rep. 889;) *Conlan* v. *Grace*, 36 Minn. 276, (30 N. W. Rep. 880.) The evidence justified the findings of fact.

Judgment affirmed.

(See, also, 2 Pom. Eq. Jur. § 801; 2 Story, Eq. Jur. p. 860; Id. § 1533, note; Pickard v. Sears, 6 Adol. & E. 469, 473; Slim v. Croucher, 1 De Gex, F. & J. 525; Hartshorn v. Potroff, 89 Ill. 509; Pence v. Arbuckle, 22 Minn. 417; Eldred v. Hazlett, 33 Pa. St. 307; Nichols v. Pool, 89 Ill. 491; Angell v. Johnson, 51 Iowa, 625, 2 N. W. Rep. 435; Williams v. Insurance Co., 50 Iowa, 561; Sebright v. Moore, 33 Mich. 92; McStea v. Matthews, 50 N. Y. 166; Favill v. Roberts, Id. 222; Bodine v. Killeen, 53 N. Y. 93; Stewart v. Munford, 91 Ill. 58; Bigelow v. Foss, 59 Me. 162; Millingar v. Sorg, 61 Pa. St. 471; Patterson v. Lawrence, 90 Ill. 174; Bigelow, Estop. p. 556, and cases cited.)

(Equitable estoppel available at law. Drexel v. Berney, 122 U. S. 241, 7 Sup. Ct. Rep. 1200; Mining Co. v. Ormsby, 47 Vt. 709; Bannard v. Seminary, 49 Mich. 444, 13 N. W. Rep. 811.)

## IX. MERGER.

### The doctrine of merger is based upon the maxim that "equity looks to the intent rather than the form."

(10 Minn. 376, Gil. 302.)

DAVIS v. PIERCE.

(*Supreme Court of Minnesota.* 1865.)

When the holder of the legal title to real estate purchases an outstanding mortgage upon it, not intending that the mortgage should merge or be extinguished if it be for his interest that it should remain a lien, it will not be merged. [Wilcox *v.* Davis, 4 Minn. 197, (Gil. 139.) Horton *v.* Maffit, 14 Minn. 289, (Gil. 216.)]

Appeal from judgment of district court, Ramsey County.

The plaintiff purchased real estate upon which there were two mortgages outstanding. He subsequently purchased and took an assignment of the first, in date, of these mortgages. The second was assigned to defendants Wilcox and Barber. Plaintiff brings the action to foreclose the first mortgage. The answer claimed that the mortgage had merged in the legal estate. The finding of the court below upon the facts connected with plaintiff's purchase of the mortgage is stated in the opinion.

WILSON, C. J. The only question in this case is whether in the purchase of the March mortgage by the plaintiff, the estate or interest thus acquired merged in the legal estate.

In equity, where the legal and equitable estates become united in the same person, the equitable is merged in the legal, unless the party in whom they meet intends to keep them separate (which intention must be just, and injurious to no one); and where no such intention is expressed, it will be presumed, if it is for the interest of the party in whom the estates meet. *Wilcox & Barber* v. *Davis*, 4 Minn. [197]; *Starr* v. *Ellis*, 6 Johns. Ch. 395; *Forbes* v. *Moffatt*, 18 Ves. 384; *Clift* v. *White*, 12 N. Y. 536; 4 Kent Com. 102; *James* v. *Morey*, 2 Cow. 246. The question here, then, is one purely of intention declared or presumed. The judge who tried the cause below has found as a matter of fact that the plaintiff did not in taking the assignment of said mortgage, intend either that it should be extinguished or merged, or that it should not remain a valid or first lien upon the premises therein described, and has also found that it was for the interest of the plaintiff that the mortgage should remain a lien.

To this finding defendants' counsel objects (1), that it does not show affirmatively that the plaintiff intended to keep said mortgage lien alive; (2), that it was not competent for the plaintiff to prove or for the court to find that it was for the plaintiff's interest to keep the estate separate, that fact not having been alleged; (3), that it is not the province of the court in any case to find as a fact that it is for the plaintiff's *interest*, etc., but that the fact must be found from which this is inferred. It is true that in this finding it is not affirmatively and positively stated that in taking the assignment plaintiff intended to keep alive the lien; but from the facts found the court was authorized and bound to presume such intention. See authorities above cited.

If there was any error, therefore, in the finding in that respect it was technical and formal merely, and should be disregarded. An averment of the plaintiff's interest in keeping alive the lien, was not necessary in order to justify the reception of evidence of that fact. The interest of the plaintiff was shown merely as *evidence* of his intentions —it being presumed that he intended to act in accordance with his interest.

With reference to defendants' third objection, even if we should regard the finding of the court as the finding of a legal conclusion rather than of facts, it would not be a fatal error, as the facts from which this is inferred

are all found by the court. The evidence, we think, was clearly sufficient to justify the finding. Judgment below affirmed.

(*McMillan, J.*, being of counsel for some of defendants, took no part in the hearing or decision of this cause.)

(See, also, 2 Pom. Eq. Jur. § 786; 4 Kent, Comm. 102; Story, Eq. Jur. § 1035*b*, note; Selby v. Alston, 3 Ves. 339; Wykham v. Wykham, 18 Ves. 418; Brydges v. Brydges, 3 Ves, 125*; James v. Morey, 2 Cow. 246; Mulford v. Peterson, 35 N. J. Law, 127; Crosby v. Taylor, 15 Gray, 64; Aldrich v. Blake, 134 Mass. 582; Clos v. Boppe, 23 N. J. Eq. 270; Mickles v. Townsend, 18 N. Y. 575; Nicholson v. Halsey, 1 Johns. Ch. 416.)

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PART IV.

# GROUNDS FOR EQUITABLE RELIEF.

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## I. ACCIDENT.

**"Accident is an unforeseen and unexpected event occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subject to some legal liability, and another person acquires a corresponding legal right which it would be a violation of good conscience for the latter person, under the circumstances, to retain."** 2 Pom. Eq. Jur. § 823.

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### Lost sealed instruments.

(70 Ill. 72.)

PATTON et al. v. CAMPBELL.

Supreme Court of Illinois. Sept. Term, 1873.

Bentley, Swett & Quigg, for appellants. Waite & Clarke, for appellee.

CRAIG, J. This was a bill in chancery, filed in the superior court of Cook county, by George W. Campbell, as assignee in bankruptcy of the late firm of Durham & Wood, against William Patton and others, to recover the value of certain goods which had been replevied by Patton & Co. from Durham & Wood.

It appears from the record that on or about the 20th of October, 1870, Patton & Co., of New York, sold Durham & Wood, of Chicago, a bill of goods, amounting to $1,600, on a credit of four months. About the first of November, after the sale, Durham & Wood failed, and Patton & Co. commenced an action of replevin to recover the goods they had sold. A replevin bond in the penal sum of $1,000, in the usual form, was filed with the papers in the action, and $800 or $900 worth of the goods were replevied.

In the fire of October 8th and 9th, 1871, the papers in the case, including the bond, were destroyed. Subsequently the action was dismissed.

The defendants answered the bill, to which replication was filed, the cause was heard on the proofs taken, and decree rendered in favor of complainants for $850.

The defendants bring the cause to this court, and seek to reverse the decree on two grounds:

First. For the reason a court of chancery has no jurisdiction, the remedy of complainants being complete at law.

Second. The purchase of goods from Patton & Co., by Durham & Wood, was fraudulent, and Patton & Co., upon discovery of the fraud, had the right to rescind the sale and replevy the property.

The questions will be considered in the order in which they are raised.

The bill in this case is filed to recover upon an instrument under seal, which had been destroyed.

The jurisdiction of a court of equity arising from accident is a very old head, in equity, and probably coeval with its existence. But it is not every case of accident which will justify the interposition of a court of equity. The jurisdiction will be maintained only when a court of law can not grant suitable relief; and where the party has a conscientious title to relief. 1 Story, Eq. Jur., § 79.

In case, however, of lost instruments under seal, equity takes jurisdiction, on the ground that, until a recent period, it was the settled

doctrine that there was no remedy on a lost bond in a court of common law, because there could be no profert of the instrument, without which the declaration would be defective. The jurisdiction having been assumed and exercised on this ground, it is still retained and upheld. 1 Story, Eq. Jur., § 81; Walmsley v. Child, 1 Vesey, Sen., 341; Fisher v. Sievres, 65 Ill. 99.

Under the allegations in the bill in this cause, we think it is well settled that a court of equity had jurisdiction.

The remaining question in the case is, were the goods purchased under such circumstances as gave the appellants the right of rescission on the ground of fraud, or was there such a fraud practised that the title to the property did not pass to Durham & Wood?

The evidence shows that Hart, who was a traveling agent for appellants, called on Durham & Wood, in Chicago, to sell them goods. They examined his samples and told him they wanted to make a large order, and wanted to buy on four months' time. Hart told them, Patton & Co. hardly ever vary from three months' time. Durham remarked, he had bought and could buy of A. T. Stewart & Co., of New York, on four months' time. On this statement, Hart sold the goods on four months' time.

It turned out, on investigation, that Durham & Wood had only bought two bills of goods of Stewart & Co., and they were sold on thirty days' credit.

While it is true the statement made by Durham, that he had bought and could buy goods of Stewart & Co. on four months' time, was false, yet, it does not appear that this statement induced Hart to sell the goods; it only had the effect to cause him to give one month longer credit on the goods than he otherwise would, which did not, in this case, in anywise affect the rights of appellants, for the reason that the failure occurred and the goods were replevied within less than two months after the sale.

It appears, from the evidence, that Hart made no objection to sell the goods on three months' time; he neither asked nor required any representations from Durham, as to the standing or responsibility of the firm, to induce him to sell the goods on a credit of three months. At the time the goods were purchased, it does not appear that Durham & Wood were in failing circumstances, insolvent, or in any manner pressed by their creditors; for aught that appears they were at that time solvent, and responsible for all their contracts.

Neither does it appear that they made any false representations in regard to what they were worth, what property they owned, or the amount of debts they had contracted.

It is not shown that the goods were bought with the intent not to pay for them, or with a view to make an assignment.

We understand the rule to be, that if a party, knowing himself to be insolvent, or in failing circumstances, by means of fraudulent pretenses or representations, purchases goods with the intention not to pay for them, but with the design to cheat the vendor out of his goods, such facts would warrant the vendor in rescinding the contract for fraud, and would justify him in recovering possession of the property by replevin, where the goods had not in good faith passed into the hands of third parties. Henshaw v. Bryant, 4 Scam. 97.

But the case under consideration does not come within this rule.

There is no evidence in this record to show that the goods were bought with any impure or wrong motives.

It is true that, some two months after the purchase of the goods, the parties went into bankruptcy, but this was involuntary, and does not, of itself, show the condition of the firm at the time the goods were bought.

Upon a careful examination of the whole record, we are satisfied the decree of the court below was correct, and it will be affirmed.

(See, also, 2 Pom. Eq. Jur. § 831; East India Co. v. Boddam, 9 Ves. 464; Walmsley v. Child, 1 Ves. Sr. 341.)

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## Lost unsealed instruments.

(53 Ga. 36.)

HARDEMAN et al. v. BATTERSBY.

Supreme Court of Georgia. July Term, 1874.

R. F. Lyon, for plaintiffs in error. Lanier & Anderson, for defendant.

WARNER, C. J. This was a bill filed by the complainant, as the surviving copartner of the firm of William Battersby & Company, against defendants, in which the complainant alleges that in May, 1864, Battersby & Company placed in the hands of one North certain cotton receipts given by the defendants, as warehousemen, to have the cotton specified therein shipped to them at Savannah, the cotton being the property of complainant; that North died without having removed or disposed of thirty bales of said cotton; that complainant is unable to find defendants' receipts for the cotton among the papers of North, after a careful search; that the same were lost, destroyed or misplaced whilst in the possession of North, and cannot be found; that complainant has demanded the cotton of defendants, which they said they would deliver on the production of their receipts, complainants then and there offering

to indemnify them from liability to any other person or persons on said cotton receipts, as he was unable to produce them, said receipts having been lost, destroyed or misplaced, as before stated. The defendants refused to deliver the cotton. The complainant prays that defendants may be decreed to account to him for the value of the cotton, after allowing them all proper charges and expenses for and on account of the storage of said cotton, upon his giving bond and security as heretofore offered by him.

Such are substantially the allegations in complainant's bill, which was filed in the clerk's office on the 19th of October, 1867, and was pending in court without any demurrer thereto, until the 23d of January, 1874, when the complainant amended his bill, at which term of the court the case came on for trial. The defendants then demurred to the complainant's bill on the ground that there was no equity in it, inasmuch as the complainant had an adequate and complete remedy at common law. The court overruled the demurrer, and the defendants excepted.

1. The receipts for the cotton were not given by the defendants to the complainant, and we infer from the description given in the complainant's bill of the marks upon the several bales, that the receipts were given and delivered by the defendants to the planter, or to the parties who originally stored the cotton in their warehouse. In Patten v. Baggs, 43 Ga. 167, it was held that where a warehouseman was sued in trover by one who claimed to be the assignee of his receipt for a number of bales of cotton, that it was not sufficient evidence of a conversion to show that the defendant refused to deliver the cotton to the claimant until the receipt was produced, or good security given to indemnify the warehouseman.

2. The point decided in that case, as applicable to the case now before us, is that the defendants, as warehousemen, are entitled to be indemnified before they can be required to deliver the cotton to the plaintiff, or to account to him for its value. Before the adoption of the Code allowing the common law courts to mould verdicts as verdicts and decrees are rendered and framed in equity proceedings, there can be no doubt, we think, that a court of equity would have had jurisdiction of the case as made by the complainant's bill, for the reason that the remedy in the common law court would not have been adequate to have decreed indemnity for the protection of defendants against their liability on their receipts. Inasmuch as a court of equity would originally have had jurisdiction of the case, the fact that concurrent jurisdiction has been given to the common law courts does not deprive a court of equity of the jurisdiction which it originally had; and when a court of equity and a common law court have concurrent jurisdiction, the court first taking will retain it: Code, § 3096.

3. The court of equity in this case having first taken jurisdiction of it, the demurrer was properly overruled, the more especially if the complainant's bill had been dismissed for want of jurisdiction, his remedy in the common law court might have been barred by the statute of limitations.

Let the judgment of the court below be affirmed.

(See, also, Hickman v. Painter, 11 W. Va. 386; Allen v. Smith, 29 Ark. 74.)

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## Lost negotiable instruments.

(27 N. J. Eq. 408.)

FORCE v. CITY OF ELIZABETH.

Court of Chancery of New Jersey. October Term 1876.

Bill for relief and general demurrer.

R. E. Chetwood, for demurrer. B. Gummere, for complainant.

THE CHANCELLOR. The complainant, on the 21st of January, 1872, was the owner of two bonds payable to the bearer thereof, executed and issued by the defendant—one for $500 and the other for $1,000, each payable with interest. The interest was payable on the presentation of coupons or warrants, also payable to the bearer thereof, attached to the bonds. The bonds, with the coupons attached, were, on the day above mentioned, stolen from the vault of the Trenton Banking Company, where the complainant had deposited them for safe keeping. She gave notice by advertisement of her loss, but failed to recover either the bonds or the coupons. In April, 1875, she tendered to the defendant proper indemnity, and demanded payment of the principal and interest of the bond for $500, the principal of which was then due, and of the interest due on the other bond. The principal of that bond was not due. Payment was refused. She subsequently instituted this suit to compel the defendant to pay to her the amount due, and to become due during the pendency of this suit, on the bonds, offering to indemnify the defendant against loss or damage by reason of the payment, in such manner and with such sureties as this court might direct. In support of the demurrer, the defendant's counsel insists that the complainant is not entitled to relief in equity, because the loss alleged in the bill was through theft, and the bonds and coupons were not due at the time when they were stolen, and were of the character of negotiable paper; and further, because she has

an adequate remedy at law. Neither of these grounds is tenable. Equity, in relieving against the loss of such instruments as these bonds, makes no discrimination against loss by theft. If the complainant has a remedy at law, it is by virtue of the statutory provision that "in an action upon any negotiable instrument which is lost, or upon any plea or notice of set-off founded on such instrument, the fact that such instrument was lost while negotiable by delivery or otherwise, shall not prevent a recovery thereon in a court of law; but a court of law shall give judgment in the same manner as if such note was not lost, and may take the same order thereon as a court of equity would to indemnify the party charged against the payment thereof." Revision, 898, § 7. Apart from the question suggested, whether the use of the word note, in the latter clause of the section above quoted, does not limit the power given by the section to suits upon or set-offs of lost promissory notes, it is enough to say that this court is not ousted of any part of its original jurisdiction by the fact that a court of law exercises the same or a similar jurisdiction.

The demurrer will be overruled, with costs.

(See, also, Savannah Nat. Bank v. Haskins, 101 Mass. 370; Tuttle v. Standish, 4 Allen, 481.)

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## Lost judgments.

(65 Ill. 99.)

FISHER v. SIEVRES.

Supreme Court of Illinois. Sept. Term, 1872.

Story & King, for appellant. John Lyle King, for appellee.

SHELDON, J. The bill in chancery in this case, filed in the circuit court of Cook county, sets forth that on the 2d day of August, 1871, in a suit at law, wherein Sievres was plaintiff and Fisher defendant, a judgment was recovered by the former against the latter in the said circuit court for the sum of $125, and that on the 9th day of October, 1871, the court house in the city of Chicago, together with all the books, papers and records of said court, and of its clerk's office, among which were the files and the record of said suit and said judgment, was wholly consumed and destroyed by fire.

The bill further alleges that no execution ever issued on the judgment; that the court had denied a motion for an order that execution issue on it, and prays that the judgment be made and declared a decree of the circuit court, or that Fisher be declared indebted to the complainant in the amount of the judgment, and be decreed to pay the same, or that execution issue against Fisher.

The bill waived the answer of the defendant, under oath. The court rendered a decree against Fisher for the amount of the judgment.

He appeals, and makes the objection that the bill should have been dismissed, because there was a complete remedy at law.

A court of equity not unfrequently takes jurisdiction in the case of lost or destroyed instruments of evidence, under the familiar head of equity jurisdiction arising from accident; but it is not every case of accident which will justify the interposition of a court of equity.

The jurisdiction will be exercised only when a court of law cannot grant suitable relief. 1 Story, Eq. Jur. § 79.

In the case of lost instruments of writing under seal, equity interposes, for the reason that, until a recent period, the doctrine prevailed that there could be no remedy on a lost bond, in a court of common law, because there could be no profert of the instrument, without which the declaration would be defective; and as the jurisdiction was originally assumed for that reason, it is still retained. And in the case of lost negotiable securities, where the purposes of justice may require that a suitable bond of indemnity should be given, a remedy may be had in equity, where an offer of indemnity may be made and the indemnity be provided for.

We apprehend the bill must always lay some ground besides the mere loss of the instrument of evidence, to justify the interposition of a court of equity to grant relief. 1 Story, Eq. Jur. §§ 84, 86.

No other ground is here laid besides the destruction of the record. It does not appear wherein a court of law could not grant the needed relief, where, as here, no more is sought than a decree for the payment of the amount of a judgment and process for its collection. We do not perceive why an action at law might not as well have been brought upon this judgment as a suit in equity; why the same evidence would not have been admissible in the one court as in the other, and why the same proof that would have justified a decree in chancery for the amount of the judgment would not have warranted a judgment at law for the recovery of the same amount.

Besides, there was a remedy at law, by motion in the court in which the judgment was rendered, to supply the record.

We are of opinion the bill should have been dismissed, because there was an adequate remedy at law.

The decree is reversed and the bill dismissed without prejudice.

Decree reversed.

BREESE, J. I concur in holding the remedy was complete at law by motion in the court in which the judgment was rendered.

## Accidental forfeitures.

(35 Conn. 195.)

BOSTWICK v. STILES.

Supreme Court of Errors of Connecticut. Aug. Term, 1868.

E. W. Seymour and M. J. Warner, for petitioner. G. C. Woodruff and Peet, for respondent.

PARK, J. We have had this case under advisement for a considerable length of time, and have thoroughly considered the several questions involved, and on the whole we have come to the conclusion that the court ought to interfere in behalf of the petitioner, and allow him another opportunity to redeem the premises.

It is the peculiar province of a court of equity to grant relief in cases of fraud, accident, or mistake, where there has been no fault on the part of the party seeking relief. Bank v. Eldredge, 28 Conn. 556; 1 Story, Eq. Jur. § 439. The equitable definition of the term accident includes not only inevitable casualties, and such as are caused by the act of God, but also those that arise from unforeseen occurrences, misfortunes, losses, and acts or omissions of other persons, without the fault, negligence, or misconduct of the party. 1 Story, Eq. Jur. § 78. Relief on the ground of accident is limited to obligations imposed by law, and does not apply to contracts voluntarily entered into by the parties. In relation to the latter, no relief can be granted for their nonfulfillment on the ground of accident, for the risk was voluntarily assumed. 1 Story, Eq. Jur. § 101.

It is found as a fact in the case, that the petitioner intended and expected to redeem the premises, and never entertained the thought of allowing the time limited by the court for redemption to expire without meeting the payment. But he had but little property besides the mortgaged premises, and had to resort to his friends to assist him to the necessary funds for the purpose. The amount to be raised was a large sum for a man in his pecuniary circumstances, and, considering the great disparity between the mortgage debt and the value of the mortgaged property, it would be strange indeed if he neglected to exercise the utmost diligence to make sure of the necessary funds in time for the payment. He had more than eight thousand dollars worth of property mortgaged for a sum less than four thousand, and that property was nearly all he owned.

Negligence under such circumstances would seem to be almost impossible. He knew that he must comply with the decree of the court or lose his property, and we should expect that he would not rest either day or night till he had secured the necessary funds to be forthcoming at the time appointed.

The case finds in effect that this was true. He applied to his uncle, a gentleman of ample property, for the necessary amount, and was promised that he should have it on Saturday, the third day of August. The time limited for redemption expired on Monday, the fifth day of August. The case finds that the petitioner had good reasons to suppose that the money would be furnished in accordance with the agreement; but for some reason, not fully explained, he was wholly disappointed. It was said in the argument that the uncle was unexpectedly detained on his way home from a journey, and did not arrive in season.

But however this may be, the question is, whether these facts are sufficient to show that the failure to pay the respondent on the fifth day of August was occasioned by accident, without any fault or negligence on the part of the petitioner.

If the petitioner had collected the amount, and had it in his house to pay the respondent on that day, but on the night previous his dwelling had taken fire, and the money had been consumed, no one would doubt that the nonpayment was the result of accident. If the petitioner had made arrangements with a bank, and they had agreed to furnish the money on certain security, and the security had been given, but owing to some sudden and unexpected revulsion in financial affairs they had refused to fulfill their agreement at the last hour, could there be any doubt that the failure to pay according to the decree was owing to accident? Wherein does this case differ in principle? The uncle of the petitioner was both able and willing to furnish the money. He had agreed to do so, and, looking at probabilities in relation to future events, it was as morally certain that the money would be furnished in the case of the uncle as in the case of the bank. There is a degree of uncertainty in regard to all expectations, and no more ought to be required in relation to future obligations imposed by law, than that such measures shall be taken to fulfill them as will render it reasonably certain, so far as human sagacity can foresee, that they will be performed. If such measures are taken and they result in a failure to pay as the decree requires, how can it be said that a party has been guilty of negligence? Even in actions at law no greater degree of care is required to avoid injuries to others while in the performance of lawful acts, and if damages result they are regarded as occasioned by inevitable accidents. Applying this rule, and considering the case at the time the promise was made, was there any reasonable doubt, that would suggest itself to a man of prudence and sagacity, that the money might

not be furnished? The relation of the parties was that of uncle and nephew. The uncle had agreed to furnish the money. The case removes all doubt of his ability to do so. He knew the importance of fulfilling his promise. He knew his nephew was depending upon him, and that it would be worse than cruelty to disappoint him at the last. Every person in like circumstances would be led to suppose that the promise of the uncle was equivalent to having the money in hand.

We think therefore that the petitioner was prevented from paying the respondent the amount of his claim on the third day of August as he had intended, by the happening of some unforeseen event, over which the petitioner had no control, and that he was consequently free from fault.

These considerations seem to decide the case for the petitioner, for he had but one day remaining in which to comply with the decree of the court, and it would be quite remarkable if a man in his pecuniary circumstances could raise so large a sum of money in a few hours. But it appears that he found a man by the name of Russell who had United States bonds sufficient to pay the amount due, but not the money. Mr. Russell was willing to advance the bonds, if the respondent would accept them in payment. At the request of the petitioner he went to the house of the respondent between nine and ten o'clock in the evening of the fifth day of August, and found that he had retired. He made known his business to the wife of the respondent, and requested her to inform her husband that he had come at the request of the petitioner to redeem the mortgaged premises, and was prepared to do it. The message was delivered to the respondent and word was returned by him that he was sick; and the attempt to redeem the premises failed. There is no finding in the case that he was in fact sick. If he had been in that condition he would have been anxious to have shown it, and the fact would have appeared, especially after evidence had been given of the word sent to Mr. Russell. The statement was doubtless untrue, and made for the purpose of avoiding Mr. Russell. He was anxious to get the four thousand dollars worth of property in addition to his mortgage claim, and if he could obtain it by a falsehood he was ready and willing to make the statement. It is true he was not bound to take the bonds in payment; but the word that was sent by Mr. Russell was, that he was prepared to redeem the premises. The respondent therefore supposed that he had the money. This conduct of the respondent is in keeping with his conduct afterwards. The petitioner informed him some time after, (how long does not appear,) that he was desirous of redeeming the premises and expressed his readiness to pay the money if the respondent would accept it. The respondent said that all he wanted was his money and interest. The petitioner then requested him to name a time for doing the business, but the respondent never fixed any time for that purpose. The sum to be paid was large, and the request was reasonable if the respondent was sincere in what he stated. But it is easy to see there was no sincerity in it. If he had been willing to accept the money he would have named a time, for he would have been anxious to have the business closed. The motive that induced him to give a false account of his condition, in order to avoid receiving payment from Mr. Russell on the evening of the last day of redemption, was actuating him now. He had got more than eight thousand dollars worth of property for considerably less than one-half of its value, and he intended to keep it. He did not think it advisable to say so directly, and thought it expedient to deceive the petitioner for a time by the show of willingness to take the money, but took good care not to name a time when he would accept it. If the petitioner had tendered the amount the day after the time limited for redemption had expired, it is clear he would have refused it, and the tender would have been useless. This conduct of the respondent does not entitle him to favor in a court of equity, and on the whole we are of the opinion that the prayer of the petition should be granted, and so we advise the superior court.

In this opinion the other judges concurred.

(Accidental judgments. Stowell v. Eldred, 26 Wis. 504; Foster v. Wood, 6 Johns. Ch. 87.)
(As to overpayments by executors, see Orr v. Kaines, 2 Ves. Sr. 194; Edwards v. Freeman, 2 P. Wms. 435; Anon., 1 P. Wms. 495.)

**As a general rule, accident is not a ground for relief as to contract liabilities.**

(25 Conn. 530.)

SCHOOL DIST. NO. 1 v. DAUCHY.

Supreme Court of Errors of Connecticut. Feb. Term, 1857.

Hawley & Ferry, in support of the motion. Dutton & Carter, contra.

ELLSWORTH, J. It is not important, whether we consider the question in this case as arising out of the objection to the defendant's evidence, or out of the charge to the jury. The question is the same in either case, and it is this. Was the defendant discharged from his contract to complete and deliver the said school-house by the time agreed, the first Monday of May, 1854, by reason of the fact, that just before that day it was burnt and wholly destroyed by lightning?

There is no dispute as to the terms of the contract, nor as to their import and force. The defendant did agree absolutely and unqualifiedly, that the building should and would be completed and ready to be delivered to the plaintiffs by the first Monday of May at the farthest. This he has not done. The building has not been completed nor delivered, although it is true he nearly finished it, and it is found could and would have completed it, had it not been destroyed by lightning. In the contract, he made no provision for any contingency or event whatever, and the question is, can he now incorporate into his contract a provision for a contingency or a condition, or must he abide by his positive and absolute undertaking.

We believe the law is well settled, that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible or unlawful, at the time of the promise, he is bound by his promise, unless the performance, before that time, becomes unlawful. Any seeming departure from this principle of law, (and there are some instances that at first view appear to be of that character,) will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject, or from the situation of the parties, rather than from a denial of the principle itself. Such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives, the horse dies; in which case, the parties are held to have contracted in view of that contingency. In these and like cases, the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued, so that there would be an object and an interest in the execution of the contract. These and a few other exceptions of a similar character, are to be found in the books, but they are not so much exceptions after all, as cases where the intention of the parties is presumed or inferred, though not expressed, from their peculiar situation, or from the subject matter itself.

It is said, however, that there is one real exception to the rule, viz., where the act of God intervenes to defeat the performance of the contract; and that is the exception on which the defendant relies in this case. The defendant insists, that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake. The cases show no such exception, though there is some semblance of it in a single case which we will mention. The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law. It is further said, that the books declare, that where the condition of a bond becomes impossible by the act of God, or is prohibited by the law, the condition becomes void and the bond is absolute, or if it be a subsequent condition for the devesting of title, that the condition becomes void, and the title remains good. Whether even this is true, without some qualification, we are not quite confident, nor will we stop to consider; but if so, still, the doctrine of that class of cases does not reach the present one, as the same books abundantly declare.

In Platt on Covenants, p. 582, it said that the rule daid down in Paradine v. Jane, Aleyn, 27, has often been recognized in courts, as a sound one, viz.: where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore if a lessee covenants to repair, the circumstance of the premises being consumed by lightning, or thrown down by an inevitable flood of water, or an irresistible tornado, will not effect his discharge. But where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there

the law will excuse him, as in the case of waste where the house is destroyed by a tempest. In some cases where the act of God renders performance absolutely impossible, the covenants shall be discharged quia impotentia excusat legem; as if a lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest; or if one covenants to serve another for seven years, and he dies before the expiration of the seven years, the covenant is discharged, because the act of God defeats the possibility of performance. I should rather say because it is implied that the thing shall exist or life be prolonged, or else the contract of course cannot be broken. Chit. on Cont. (5 Amer. Ed.) p. 60, says, "But a promise is not void against the party who makes it, merely because its execution is improbable or difficult, or because the impossibility of performing it applies only to the promisor individually, the law not forbidding the thing to be done, and there being no breach of moral duty involved in it. If a party by his own contract, lay a charge upon himself, he is bound to perform the stipulated act or pay damages for the non-completion, unless the matter was, at the time, manifestly and essentially impracticable." The same is laid down in 2 Pars. Cont. 184. In Com. Dig. tit. Condition d. 1, it is said, "And if a man covenants or promises to do a certain thing, at a certain time, and it becomes impossible by the act of God, he shall not be excused." See the cases of Bullock v. Dommitt, 6 Term R. 650, where the lessee was held bound to rebuild in case of fire, Monk v. Cooper, 2 Str. 763, and Atkinson v. Ritchie, 10 East, 530, where the freighter of a vessel covenanted to proceed to St. Petersburgh and there take a full cargo, but was prevented by an embargo. Lord Mansfield and the other judges held that no exception not contained in the contract itself, could be engrafted upon it by implication, as an excuse for its non-performance. The rule laid down in the case of Paradine v. Jane, Aleyn, 27, has been often recognized in courts as a sound one, that where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity. In Barret v. Dutton, 4 Camp. 333, Gibbs, C. J., says, "Ice being in the Thames, which rendered it impossible, did not excuse the non-performance of the charter party: there was an absolute undertaking by the freighter of this ship to load and discharge her in thirty days, and whether it was or was not possible for him to do so from the state of the weather, is quite immaterial." So in Barker v. Hodgson, 3 M. & S. 267, it was held, that an infectious disease at a port, which prevented commercial intercourse, did not discharge or qualify the covenant in the charter party. So in Shubrick v. Salmond, 3 Burr. 1637, it was held, that though contrary winds and bad weather would not allow of the captain's proceeding with his vessel to her port in South Carolina, as he had agreed to do, the covenanter was liable. The same principle is laid down in Harmony v. Bingham, 2 Kernan, 106, that "where a party engages unconditionally by express contract to do an act, performance is not excused by inevitable accident or other unforeseen contingency, not within his control." So in Adams v. Nichols, 19 Pick. 275, the court held that where a person contracted to build a house on the land of another, and the house was, before its completion, destroyed by fire, without his fault, he was not thereby discharged from his obligation to fulfill his contract. The court most fully recognize the rule, that the act of God will not operate to discharge a promise which is absolute and unqualified in its terms, though the contingency is beyond the power of the contractor. The same is held in Lord v. Wheeler, 1 Gray R. 283, though the case was taken out of the rule by its peculiar circumstances. These and other authorities which might be cited, satisfy us that the law was not correctly laid down in the court below, and concurring as we do with the doctrine of those cases, we advise a new trial.

STORRS and HINMAN, JJ., concurred.

(See, also, Stees v. Leonard, 20 Minn. 494, [Gil. 448.])

(Equity will not protect one from the results of his own negligence. Town of Barnet v. Passumpsic Turnpike Co., 15 Vt. 757. Nor will it aid one who has no vested rights. Whitton v. Russell, 1 Atk. 448.)

## II. MISTAKE.

**"Mistake is an erroneous mental condition or conviction induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both the parties to a transaction, but without its erroneous character being intended or known at the time."** 2 Pom. Eq. Jur. § 839.

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### (*a*) MISTAKE OF LAW.

**Ignorantia legis neminem excusat.**

(47 N. Y. 57.)

JACOBS v. MORANGE.

Court of Appeals of New York. Dec., 1871.

Appeal from judgment of the New York common pleas, affirming judgment for plaintiff.

Samuel Hand, for appellant. M. A. Kurshedt, for respondent.

PECKHAM, J. The defendant in this suit is a lawyer. The plaintiff some years since brought an action against the defendant in the marine court, in the city of New York. The defendant recovered a verdict in that suit, of $86 against the plaintiff. Without taking the case to the general term of that court, the plaintiff carried it for review to the court of common pleas of that city, and after argument there that court reversed the judgment, with costs. The defendant paid these costs voluntarily without the entry of any judgment. Within a year thereafter the court of appeals decided that the court of common pleas had no jurisdiction of a case from the marine court, until it had been first heard and decided by the general term of that court. The common pleas had previously held the other way, viz., that it had jurisdiction in such case. Some nine years after this reversal in the common pleas the defendant issued an execution in the marine court, and then the plaintiff instituted this suit in equity to stay his proceedings, and a judgment is obtained for a perpetual stay on the ground that the judgment in the marine court was erroneous, and that both parties in the review in the common pleas had acted under a mutual mistake of law.

This presents the question, can a court of equity grant relief in a case of this character upon the sole ground of a mistake of law? There is no circumstance of any description that adds anything to this ground of relief. Ignorantia legis neminem excusat and kindred maxims are old in the law. If they are true, this judgment is erroneous.

In early times the jurisdiction of the court of chancery in the hands of chancellors unskilled in the law was almost without limit; but for very many years that court has been guided by rules and precedents, by the science of the law as much as courts of common law. Their jurisdiction and modes of relief are well settled. The statutes and laws of the land are as much the law there as in any other court. 1 Story Eq., § 19; Id., §§ 17, 18.

The whole basis for this relief is founded upon the fact that an inferior court made an erroneous decision upon a question of law; that the plaintiff was misled thereby and suffered this loss. This is the best position the plaintiff can take. This must be the "surprise" sometimes spoken of in the books. Jeremy Eq. Jur. 366.

What a flood of litigation would such a rule open? If this can be regarded as the "surprise" that requires or justifies equitable relief, how broad is the principle, how extensive its ramifications? Almost every case reversed by this court would form a basis for such "surprise," especially where courts of last resort reverse or modify their own decisions. How many cases are lost at the trial or upon review by the ignorance of counsel in failing to perceive the point, or in failing to present it properly for review. How easy to get up cases, in the ordinary affairs of life, of a misunderstanding of the law. Thus the same principle would extend to courts of equity for errors committed or assumed to be committed there. Under such a system of jurisprudence it would be difficult to reach the end of a lawsuit.

In this case the statute of this state provided a mode of review of judgments rendered in the marine court. The time and the manner were prescribed. This statute was well known to these parties, or should have been but for their negligence. Yet the plaintiff, with the statute before him, passed for the sole purpose of enabling the party aggrieved to review a judgment in the marine court, comes to a court of equity for relief against his ignorance of the manner of obtaining such review.

We are referred to no principle or authority to sustain such an action, and I think none can be found.

On this point Chancellor Kent observed: "A subsequent decision of a higher court in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. Every man is to be charged at his peril with a knowledge of the law." Lyon v. Richmond, 2 Johns. Ch. 51, 60.

Though the decree in that case was reversed by the court of errors (14 Johns. 501), it was entirely upon other grounds.

In Storrs v. Barker, 6 Johns. Ch. 166; 10 Am. Dec. 316, where ignorance of the law was set up as a ground of defense, the court affirmed the rule that ignorance of the law with a knowledge of the facts was no ground of defense. See 1 Story Eq., § 120, to the same effect.

Suppose the plaintiff had misunderstood the statute as to the time of appeal, could a court of equity extend the time prescribed by the statute? Many such cases have occurred from a misapprehension of the law as to when a judgment is perfected. Courts of law could grant no relief, and I am not aware that any lawyer has supposed that a court of equity had any more power to extend the statute.

In Champlin v. Laytin, 18 Wend. 407; 31 Am. Dec. 382, in the court of errors on appeal from chancery, Bronson, J., reviewed the authorities in a sound opinion, showing as he claimed that there was really no authority against the rule that ignorance of the law simply was no ground for relief.

The opinion of Paige, Senator, the other way, does not seem to me to be well grounded. He was of opinion that the judgment in that case could be affirmed upon other grounds. But the principle laid down by him denies relief to the plaintiff in this case. He recognized a difference between ignorance of the law and a mistake of the law. Adopting the language of Johnson, J., in Lawrence v. Beaubien, 2 Bailey, 623; 23 Am. Dec. 155, who says: "The former is passive, and does not presume the reason. The latter presumes to know when it does not, and supplies palpable evidence of its existence." He would grant relief in the former not in the latter.

The difficulty of proving the one or the other seems to constitute all the difference in the cases.

Without any special review of authorities on this question which we have particularly examined, it is enough to say that it is conceded that no case has been found warranting the interference of a court of equity upon facts like these, and no sound principle will authorize it.

The decree must be reversed, without costs. All concur.

(See, also, Bilbie v. Lumley, 2 East, 468; Hunt v. Administrators of Rousmaniere, 1 Pet. 1; Bank of U. S. v. Daniel, 12 Pet. 32; Goltra v. Sanasack, 53 Ill. 456; Mellish v. Robertson, 25 Vt. 603; Shotwell v. Murray, 1 Johns. Ch. 512; Stoddard v. Hart, 23 N. Y. 556.)

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## LIMITATION OF FOREGOING RULE.

### Whatever exceptions there may be to this rule, they will be found on careful examination to involve some peculiar considerations controlling the decision.

(19 Tex. 303.)

MORELAND v. ATCHISON.

Supreme Court of Texas. Tyler Session, 1857.

Evarts & Hendricks, for appellant. J. T. Mills, for appellee.

WHEELER, J. Whatever differences of opinion adjudged cases may exhibit, as to the cases where the purchaser of land will be entitled to have the contract rescinded, or to be relieved against securities given for the purchase money, where there is no charge of fraud, it is clearly settled beyond controversy, that chancery will decree a return of the purchase money, for insufficiency of title, even after the purchase has been carried completely into execution, by delivery of the deed and payment of the money, and whether the deed was with or without covenants, provided there had been a fraudulent representation as to the title. (Edwards v. McLeay, Cooper's Eq. R. 308; Fenton v. Browne, 14 Ves. 144; Denston v. Morris, 2 Edwards' Ch. R. 37; 2 Kent, Com. 471.) The petition avers such fraudulent representation; and the only question is, whether it was of a matter respecting which the party can claim to be relieved, on the ground of the deception and fraud,—whether he was not bound to know the law, which disabled the defendant from making title, and whether, to grant him relief would not be to relieve against ignorance or mistake of law. The maxim ignorantia legis neminem excusat, is respected equally in courts of equity and law. The legal presumption

is, that every man who is not non compos mentis, knows the law, where he knows the facts; and this presumption, though arbitrary and false in fact, is founded upon reasons of sound policy; for although a thorough knowledge of the law presupposes a life devoted to the laborious study of its principles, and in the application of the knowledge thus acquired, to the complicated affairs of men, there will questions arise upon which the best informed will differ in opinion, and no such thing as absolute certainty can be attained, yet without some arbitrary rule, imposing upon all the duty of well considering and understanding the consequences of their acts and contracts, there would be no limit to the excuse of ignorance, no safety to society, and no security in any obligation. The law presumes therefore that every man who makes a contract, acts advisedly and with a knowledge of its legal effect and consequences. The question whether, in any case, mere ignorance or mistake of law will entitle a party to relief, has been much discussed by judges and commentators, and is still a disputed question. (1 Story's Eq. Ch. 5, Sec. 111 to 138.) Judge Story says that "agreements made and acts done under a mistake of law, are (if not otherwise objectionable) generally held valid and obligatory. The doctrine is laid down in this guarded and qualified manner, because it is not to be disguised, that there are authorities which are supposed to contradict it, or at least to form exceptions to it." (Id. Sec. 116.) Chancellor Kent was equally guarded in his statement of the rule, in Storrs v. Barker, (6 Johns. Ch. R. 169, 170.) The supreme court of the United States, in Hunt v. Rousmanier, (8 Wheaton, 214,) while they expressed a decided affirmation of the general rule, qualified it by the admission that it was not universal, and that there may be cases in which mere ignorance of law alone would entitle a party to relief in a civil matter, on the ground of the presumption of imbecility, or fraud, which might arise. In noticing this case, Chief Justice Robertson, in delivering the opinion of the court of appeals of Kentucky in Underwood v. Brockman, (4 Dana, 309,) where he examines the subject in an elaborate opinion, says the court might have added also, the additional and more conclusive and plain ground of a want of consideration. In South Carolina and Kentucky the universal application of the general rule is not admitted. (Lowndes v. Chisholm, 2 McCord Ch. 455; Lawrence v. Beaubien, 2 Bail. 623; Hopkins' Ex'rs v. Mazyck, 1 Hill. Ch. 242; Underwood v. Brockman, 4 Dana, 309.) The review of the decisions by Judge Story, shows that there are very many apparent, and he dares not deny that there are some, though he thinks but few, real exceptions to the general rule; and he says they generally stand upon some very urgent pressure of circumstances. (Story's Eq. Sec. 137.) The general rule, it has been truly said, is justified by considerations of public policy; and yet so harsh a rule, founded upon a presumption so arbitrary, ought to be modified in its application, by every exception which can be admitted without defeating its policy. "If there be, at the time a contract is entered into, a mistake of the law applicable thereto, which entirely modifies it, to enforce such an agreement is to create a new contract, which was never assented to understandingly, and to impose duties and liabilities, which the party never contemplated assuming. So, also, if there be a promise, or an actual performance of a contract, upon the supposition of liability, that liability becomes the very basis of the contract, and its non-existence being an utter failure of consideration, an executory or executed contract founded thereupon, would, by one of the first principles relating to contracts, be wholly void." (Story on Con. 407, note.) Admitting the rule that ignorance of the law, with a knowledge of the facts, cannot generally be set up as a defence, (6 Johns. Ch. R. 169, 170,) there are other elements in the present case, which bring it within the exceptions, or take it out of the operation of the rule, and entitle the party to relief. It is not a case of mere ignorance of law, unmixed with fraud and ignorance of fact. There was both fraud and ignorance of fact, as well as law. And it has been the constant practice of courts of chancery to grant relief, where the case did not depend upon a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, or advantage taken of another's situation. (Story's Eq. 120, et seq. and notes.) There was, in this case, misrepresentation and fraud, if corruptly deceiving one, as to matter of law, amounts to fraud, in a legal sense; and we do not doubt that it may, where, as in this case, advantage is taken of the ignorance of the party. An immigrant arrives in the country, and his first object is to procure a home. He, of course, is ignorant respecting the land titles of the country; and he meets with an old citizen who professes familiarity with them, and who proposes to sell him land to which he assures him he had a perfectly good title. The immigrant relies on his superior information, and trusts to his representation; and has he not a right to do so? When one who has had superior means of information, professes a superior knowledge, even of the law, and thereby obtains an unconscientious advantage of another, who is confessedly ignorant, and who has not been in a situation to be informed, is not the injured party as much entitled to relief, on the

ground of fraud, as if the misrepresentation were of a matter of fact? We think he is. The plaintiff is not supposed to have had a knowledge of the laws of this state until he came within their influence. Ignorance of the law signifies ignorance of the laws of one's own country; ignorance of the law of a foreign government, is ignorance of fact. (Haven v. Foster, 9 Pick. R. 112, 130.) To deny him relief against a ruinous contract, induced by the misrepresentation of one who professes a knowledge of the subject, and who has been in a situation to be informed, while he has not, and when, if he had been informed, he would not have made the contract, would not only be extremely unreasonable and unjust to the injured party, but it would be giving a premium to the other party for taking advantage of his ignorance. It would be plainly repugnant to good morals and fair dealing. There can be no good reason why the law, in this case more than any other, should suffer one who has no right or title, to retain that which is the property of another.

But the truth or falsehood of the representation did not depend upon a mere question of law; nor would a knowledge of the law alone have enabled the plaintiff to detect its falsehood. He might have known that the land included within the boundaries of the colony was reserved by law from location and pre-emption, and still have been ignorant of the fact that this land was within the bounds of the reserved territory. Whether the defendant had or could make a good title to the land was a question of fact as well as law, no less in this, than in other cases where there had been a prior appropriation of the land. The misrepresentation, therefore, was of matter of fact, as well as law. The consequence is, that the defendant has obtained the property of the plaintiff without consideration, and by means which does not divest the latter of his title, and ought not, on principle, to deprive him of his remedy. We conclude that the plaintiff has stated a case which entitled him to his action to recover back his property or its value; and that the court erred in dismissing the petition. The judgment is therefore reversed and the cause remanded.

(See, also, Bigelow, Eq. 176; Cooke v. Nathan, 16 Barb. 342; Langstaffe v. Fenwick, 10 Ves. 405; Whelen's Appeal, 70 Pa. St. 410; Dill v. Shahan, 25 Ala. 694.)

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## Mistake as to the legal effect of the terms employed is not ground for equitable relief.

(9 Conn. 96.)

WHEATON v. WHEATON.

Supreme Court of Errors of Connecticut. July Term, 1831.

A. bought a farm of his father for $4,000, giving him two promissory notes of $2,000 each, under an agreement that they should not be payable until the decease of B., and that then the notes should be surrendered to A. as his part of B.'s estate. One of the notes was drawn payable in three years, without the provision that it should be delivered up to A. on B.'s death being inserted. A., being ignorant of the legal effect of the words "payable in three years," not understanding that the note could be enforced prior to his father's death, signed and delivered the note to his father. After due, B. sues on the note, and A. prays for an injunction and other relief.

H. Strong and Judson, in support of the motion. Goddard and Welch, contra.

BISSELL, J. It is unquestionably, the province of a court of chancery to relieve against fraud, accident and mistake;—and in such cases, parol evidence is admitted, to show that the party is entitled to the relief sought. In this case, there is no pretence of fraud. The bill proceeds wholly on the ground of a mistake; and the only question is, whether such a mistake is here alleged, as falls within the general principles, and calls for the interposition of a court of chancery.

The bill contains no averment of a mistake in any matter of fact. It is not alleged, that the writings were not so drawn, as to effectuate the intention of the parties, through the mistake of the scrivener. On the contrary, it is alleged, that the scrivener was not even informed what the agreement between the parties was. Nor does the plaintiff pretend that the note was executed by him under any mistake or misapprehension in regard to its terms. He knew it was a note, on the face of it, payable in three years. Indeed, the whole bill is so framed as to preclude the idea of a mistake in any one matter of fact. The mistake, if any, was in a mere matter of law; and that, a mistake of rather an extraordinary character. It is simply, that the plaintiff mistook the legal effect of a plain note of hand: That he ignorantly supposed a note, payable, by the terms of it, in three years, to be, in law, a note payable at the death of the obligee; and then not actually to be paid, but to be delivered up. And to show this mistake,

we are asked to let in parol evidence. It would perhaps be not a little difficult to point to the source from which evidence of such a character could be derived. But waiving the difficulty, we are brought to consider the question, whether parol proof be admissible to show a mistake in law? This is the naked question, presented by this motion.

The only English authority, from which the affirmative of this question derives any support, is that of Lansdown v. Lansdown, reported in Mosely, p. 364. Lord Mansfield pronounced the book to be of no authority; and the case has been often questioned; and the doctrine involved in that decision has been overruled, by the whole train of decisions on this subject. Pullen v. Ready, 2 Atk. 587. Lord Irnham v. Child, 1 Bro. Ch. Ca. 92. Underhill v. Horwood, 10 Ves. 209, 228. Lyon v. Richmond, 2 Johns. Ch. Rep. 51.

The case of Hunt v. Rousmanier, 8 Wheat. 174, has been relied on, by the plaintiff's counsel. That case would, indeed, seem to sustain the position, that a court of chancery will relieve against a mistake in law. The bill in that case stated, that the plaintiff loaned to the defendant's intestate two sums of money of 1450 dollars and 700 dollars, for which his promissory notes were given; and as collateral security, a power of attorney authorizing the plaintiff to execute a bill of sale of two vessels, the Nerens and the Industry, to himself or any other person; and in case of loss, to collect the money, which should be due on a policy, by which said vessels and their freight were insured. The instrument contained a proviso, that the power was given as a collateral security of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount thereof and all expenses out of the proceeds of the said property, and to return the surplus to the said Rousmanier. The bill then charged, that the said Rousmanier died insolvent, having paid only 200 dollars, on said notes. The plaintiff gave notice of his claim, took possession of the vessels on their return from sea, and offered the intestate's interest in them for sale. The respondents forbade the sale, and the bill was brought to compel them to join in it. The amended bill further stated, that it was agreed between the parties, that Rousmanier was to give a specific security on the vessels, and offered to give a mortgage;—that counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken, in preference to a mortgage;—that the powers were accordingly executed, with the full belief that they would, and with the intention that they should give the plaintiff as full and perfect security as would be given by a mortgage. To this bill there was a demurrer; which was sustained by the circuit court of Rhode Island, and the bill dismissed. From this decision, the plaintiff appealed to the supreme court. The decree of the circuit court was reversed; but it being a case in which creditors were concerned, the court passed no final decree, but remanded the cause, that the circuit court might permit the defendants to withdraw their demurrer and answer the bill. Chief Justice Marshall, who pronounced the opinion of the court, in that case, fully recognized the principle, that parol evidence is not admissible to vary a written instrument; and that the rule prevailed, as well in courts of equity, as in courts of law; that courts of equity grant relief in cases of fraud and mistake; and that in general, the mistakes against which a court of equity relieves, are mistakes in fact. He undertakes to derive an analogy from that class of cases, in which a joint obligation has been set up, in equity, against the representatives of a deceased obligor, who were discharged at law. The case of Lansdown v. Lansdown is cited, with the remark, that if it be law, it has no inconsiderable bearing on the case. The court remark: "We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to be entirely misunderstood, by both parties, to say that a court of equity is incapable of affording relief."

The case being remanded to the circuit court, was there tried, on the answer of the defendants; and that court decreed, that the plaintiff was not entitled to the relief sought, and dismissed the bill. On an appeal, the case came again before the supreme court, (1 Pet. U. S. Rep. 1,) and the decree of the circuit court was affirmed. Washington, J., in pronouncing the opinion of the court, says: "The question then, is ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed, founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something very peculiar in their characters." He then adverts to the case of Lansdown v. Lansdown, and remarks: "Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported, upon a principle not involved in the question we are examining." It would not, perhaps, be going too far to say, that the doctrines laid down by Ch. J. Marshall, in this case, were greatly shaken, by the subsequent opinion of Judge Washington; and that taking the whole case together, it will hardly warrant a departure from principles long considered as settled. It is not an authority for the plaintiff. A decision in his favor would,

most obviously, be followed by all the mischiefs of parol evidence, as applied to written instruments; and would, most effectually, abrogate the rule on this subject.

I am satisfied, that this ought not to be done; and consequently a new trial must be refused.

The other judges were of the same opinion. New trial not to be granted.

See Chestnut Hill Reservoir Co. v. Chase, 14 Conn. 133. Wooden v. Haviland, 18 Conn. 105. Whitaker v. Gavit, 18 Conn. 526. Coley v. Coley, 19 Conn. 120. Osborn v. Phelps, 19 Conn. 70. Stedwell v. Anderson, 21 Conn. 143. Northrop v. Graves, 19 Conn. 548.

(See, also, 2 Pom. Eq. Jur. § 307; Powell v. Smith, L. R. 14 Eq. 85; Paine v. Smith, 33 Minn. 495, 24 N. W. Rep. 305; Gerald v. Elley, 45 Iowa, 322; Moorman v. Collier, 32 Iowa, 138.)

(Mistake as to legal rights, see 2 Pom. Eq. Jur. § 849; Hearst v. Pujol, 44 Cal. 230; Whelen's Appeal, 70 Pa. St. 410; Broughton v. Hutt, 3 De Gex & J. 500; Cooper v. Phibbs, L. R. 2 H. L. 149.)

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## Failure of the parties to use words expressing their mutual agreement is ground for equitable relief.

(48 N. Y. 415.)

PITCHER v. HENNESSEY.

Commission of Appeals of New York. Jan. Term, 1872.

Appeal from judgment in favor of plaintiff. Action for breach of contract.

J. R. Swan, Jr., for appellant. Waterman & Hunt, for respondent.

EARL, C. The plaintiff purchased three thousand bushels of wheat in Oswego, and he could get no one, neither the defendant nor any one else, to freight it for him. For the purpose therefore of securing the transportation of his wheat, he made an agreement with the defendant to purchase his boat for the sum of $1,800, and the defendant agreed to load the wheat on the boat and run the boat and transport the wheat to Martinsburgh. The sale of the boat and the contract to load and run her were all one entire agreement, the consideration of which, on the part of the plaintiff, was the $1,800 to be paid by him.

The plaintiff evidently would not have bought the boat unless the defendant had agreed to run her and carry the wheat; and the defendant would not have agreed to carry the wheat unless the plaintiff had bought the boat. This agreement was reduced to writing in two separate instruments, drawn and executed at the same time and place, one of which was a mere bill of sale signed by the defendant, transferring the boat and her appurtenances, and the other was signed by both parties and was as follows:

"Michael Hennessey is to run boat T. Matthews, this day sold to Edwin Pitcher of Martinsburgh, Lewis county, to the warehouse of said Pitcher on the Black river, in Martinsburgh, loaded at his, said Hennessey's, expense, except the tolls and insurance, which said Pitcher is to pay. Said boat to run there with ordinary dispatch and to start immediately. Risk of navigation assumed by said Pitcher. M. Hennessey. Edwin Pitcher. Dated Oswego, Nov. 22, 1864."

These two instruments are to be construed together precisely as if they were embodied in one.

By the agreement, as thus reduced to writing, the plaintiff became the owner of the boat, and the defendant agreed to take on a cargo and run her for the plaintiff to Martinsburgh; and this he agreed to do absolutely, unless prevented by some "risk of navigation." He was prevented because the boat was too large to pass the locks on the Black River canal with her cargo, and the first question to be determined is, whether the risk of passing the locks was a "risk of navigation." The learned judge who wrote the opinion of the general term held that these words had a fixed legal signification, and meant the same as perils of the sea or perils of navigation. These latter terms are held to cover losses or damage occasioned by stress of weather, winds, waves, lightning, tempest, rocks, sands and other extraordinary causes which no human care or foresight could guard against or prevent (Story Cont., § 166; 2 Pars. Mar. Law, 219; Ang. Carr., § 168), and very likely they would not cover this peril. But there is no case holding that "risk of navigation" means the same thing as "perils of navigation," and there is no authority that I have been able to find defining or fixing the meaning of this term. Hence we are to construe these words in the connection in which they are used, applying the ordinary canons of construction. We are to consider the circumstances and condition of the parties, and the objects they had in view, and thus ascertain, as well as we can, what they meant by these words. Both parties were ignorant of the precise size of the locks, and both undoubtedly supposed that the boat could pass through the locks. The plaintiff owned the boat and cargo; and the defendant was to run the boat with the cargo to Martinsburgh. The defendant was un-

willing to bear the risks which were beyond his control and were incident to navigation of the canal, and these risks the plaintiff was willing to assume. If the boat and cargo were lost without the fault of the defendant, the loss was to fall upon the plaintiff. If the defendant was prevented from reaching Martinsburgh with the boat and cargo by the freezing of the canal, or any other unforeseen or unavoidable peril of navigation, he was to be excused. He was to be excused if the canal should give away, or a lock should break without his fault. And yet, can we hold that he assumed the risk that the canal or locks were of sufficient size for his boat? Taking the relation and situation of the parties into view, I think that it is clear that the defendant meant only to assume all the risks occasioned by the negligence and misconduct of himself and his servants; and that the plaintiff meant to assume all the risks attending upon the navigation through the canal which were beyond the control of the defendant.

The plain, ordinary meaning of the language used admits of this construction, and it seems to me to be in accordance with the presumed intention of the parties. Hence I am of the opinion that the court erred in holding that the defendant had, and that the plaintiff had not, by the terms of the agreement, assumed the risk in question.

But if I am wrong in this conclusion, then I think the court erred in not allowing proof for the reformation of the contract. On the trial the defendant claimed that by the terms of the written agreement, the risk in question was assumed by the plaintiff; and that if this was not the true construction of the written agreement, then it did not express the intention of the parties, and should be reformed. After the court had held that this risk under the written contract was not assumed by the plaintiff, and rested upon the defendant, the defendant, (1) for the purpose of procuring a reformation of the contract; and (2) to explain any ambiguity there might be upon the face of said contract, and the meaning of the words "risks of navigation," as understood by the parties, offered to prove "conversations which took place between the plaintiff and defendant before the execution of the written contract between the parties which has been given in evidence. That in such conversations the defendant desired the plaintiff to furnish men and teams at Rome to assist in getting boat and cargo to Martinsburgh, where plaintiff wanted the wheat. The defendant told the plaintiff he knew nothing of the Black River canal or the size of its locks, and inquired of Mr. Pitcher if he knew the size of the locks, and said to him that he, Hennessey, would take no risk as to the length of the locks or the freezing up of the canal, and that plaintiff said he would take those risks."

The counsel for the plaintiff objected to this evidence on the ground "that it was incompetent and immaterial, and that all conversations prior to said contract were merged in the written agreement; and that there was no ambiguity upon the face of the contract which required explanation; that such testimony was incompetent and immaterial for the purpose of reforming the contract; and that defendant's answer did not present a case or contain the allegations necessary for the reformation of said contract." The court overruled the offer and excluded the evidence, and held and decided (1) that there was no ambiguity in the language of the contract which admitted of or required explanation. (2) That all communications and verbal agreements between the parties prior to the execution of the written contract between them in relation to the subject-matter thereof, were merged in the written contract, and could not be proved to contradict or vary the same, or give it a meaning beyond its plain and obvious tenor. (3) That the testimony was inadmissible for the purpose of reforming the contract, on the ground that no case was presented by defendant's answer for a reformation of the contract. It does not allege the facts upon which such reformation could be made. The judge further remarked that independent of the pleadings the reformation of a contract was a matter of equitable jurisdiction, and could not come up before the jury. To each of which rulings and decisions of the court the defendant excepted.

The court clearly erred in holding that the equitable defense or counter-claim set up by the defendant could not be tried in this action. That it could be is too thoroughly settled to admit of further dispute. New York Ice Co. v. North-Western Ins. Co., 21 How. Pr. 296; Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152; Phillips v. Gorham, 17 N. Y. 270; Bartlett v. Judd, 21 id. 200, 78 Am. Dec. 131; Lattin v. McCarty, 41 N. Y. 107.

Hence if this equitable defense was sufficiently set up in the answer it should have been tried and determined by the court; and the next question to be considered is, whether the answer was sufficient to authorize a reformation of the contract, and I cannot doubt that it was. It avers "that by the verbal agreement between the said plaintiff and defendant in relation to the delivery of said boat and cargo at Martinsburgh, aforesaid, which preceded the execution of said written contract, and in pursuance of and in conformity with which said verbal agreement, the said written contract was, as this defendant believes and avers, by both of said parties intended to be and understood to have been drawn, this defendant was not to assume or take any risk in respect to the size of the said canal-boat, as compared with the size and capacity of the locks on the Black

River canal through which the said boat would be obliged to pass on the route to Martinsburgh aforesaid, or in respect to the practicability of passing the said canal-boat through said locks, but on the contrary such risk, it was understood by both of said parties, should be and was understood by them to have been assumed by the said plaintiff in and by the terms of the said written contract for the delivery of said boat at Martinsburgh aforesaid," and prays that the written contract "be corrected and reformed by inserting therein a clause or provision that the risk of the impracticability of passing the said boat and cargo through the locks of the Black River canal be assumed by the plaintiff, should such correction become necessary to attain justice between the parties." The prayer for relief is sufficient. It indicates with sufficient certainty the correction or reformation desired, and I am unable to see why the facts alleged as the ground for the relief prayed for are not also sufficient. They are in substance, 1. That the parties made a parol agreement by which the defendant was not, and the plaintiff was, to assume the risk in question. 2. That both parties intended this agreement should be embodied in the written contract. 3. That they both understood it was so embodied. 4. That the contract was so drawn that the plaintiff assumed only the risk of navigation, and this, the court below held, did not include this risk. It is true that the answer does not in so many words aver any mistake; but the facts alleged clearly show a mutual mistake, and point out with entire certainty in what the mistake consisted. No one could doubt from the allegations contained in the answer, the ground upon which the reformation of the contract was claimed; and the court could see from the allegations in the answer, if they were proved precisely as made, how the contract was to be reformed. What more could be needed to answer any rule of pleading? We have then a case as made by the answer, where a mutual mistake was made in reducing the parol agreement to writing and in signing the written contract. In such a case equity will conform the written instrument to the parol agreement which it was intended to embody. Story, in his Equity Jurisprudence, section 115, says: "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman, either as to fact or to law, does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument." And this language was taken from the learned opinion of Mr. Justice Washington, in Hunt v. Rousmaniere's Adm'rs, 1 Pet. 13.

Parties to an agreement may be mistaken as to some material fact connected therewith which formed the consideration thereof or inducement thereto on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draftsmen, or one party only, and it may be a mistake of law or of fact. Equity interferes in such a case to compel the parties to execute the agreement which they have actually made. Sometimes it happens that parties agree, as in the case above cited from Peters, to carry out their agreement by an instrument which, by their mistake of the law, will not effectuate their intention. In such a case equity will not reform the instrument, or substitute another instrument which will in law give effect to their intention, because they adopted and agreed upon the particular instrument, and equity will not compel them to execute an agreement which they never agreed to execute, and thus make an agreement for them. But in this case the parties intended, according to the answer, to reduce their parol agreement to writing, and to embody it in the instrument; and either because they or their draftsmen did not understand the force of language, or because some language which they intended should have been inserted in the instrument was omitted by mistake, their intention was not carried into effect and the instrument failed to embody their agreement.

It is claimed on the part of the plaintiff that if the mistake occurred because both parties misunderstood the meaning of the terms "risk of navigation," both parties believing that these terms would include the risk in question, then no reformation of the contract can be had. This claim is not well founded. When parties have made an agreement, and there is no allegation of any mistake in it, and in reducing it to writing, they by mistake, either because they did not understand the meaning of the words used, or their legal effect, failed to embody their intention in the instrument, equity will grant relief by reforming the instrument and compelling the parties to execute and perform their agreement as they made it; and it matters not whether such a mistake be called one of law or of fact. Oliver v. Mutual Commercial Ins. Co., 2 Curtis, 277.

Hence I conclude that the learned judge at the circuit erred in excluding proof of the alleged mistake, and in holding that the equitable defense could not be litigated at the trial. I therefore favor a reversal of the judgments and a new trial, costs to abide event.

All concur.

## Compromise.

(11 Gray, 506.)

LEACH et al. v. FOBES.

Supreme Judicial Court of Massachusetts. Oct. Term, 1858.

One Isaac Fobes died on June 22, 1855, leaving what purported to be his last will, whereby he gave the most of his property to his wife, Oline M. Fobes. He also left one daughter by a former marriage, who claimed that this will had been procured by undue influence. While the proof of the will was pending in the probate court, the daughter and her husband compromised the matter with the stepmother by agreeing that the provisions of the will as to the daughter should be set aside, and that the testator's real estate, some shares in a corporation, and other personal property should be divided between the widow and daughter, and the agreement was reduced to writing, signed, sealed, and delivered. The plaintiff offered to make certain conveyances pursuant to such agreement, but the defendant refused to make others which she had agreed to make, and this suit is brought for a specific performance of the agreement.

E. Ames, for plaintiffs. B. Sanford, for defendant.

BIGELOW, J. The agreement set out in the bill is of a nature which is entitled to the highest favor at the hands of a court of equity. It is the result of a family compromise of a controversy which had arisen between the heir at law and the devisee of a testator, concerning his sanity and free agency at the time of making his last will. Such contracts are not against public policy. On the contrary, as they contribute to the peace and harmony of families and to the prevention of litigation, they will be supported in equity without an inquiry into the adequacy of the consideration on which they are founded. Stapilton v. Stapilton, 1 Atk. 2. Naylor v. Winch, 1 Sim. & Stu. 565. Westby v. Westby, 2 Dru. & War. 503.

There is nothing in the agreement, which tends to show that its fulfillment and complete execution by the defendant would be inequitable or operate with hardship on her. Nor are there any facts disclosed in the bill and answer, which lead to any just inference that there was any omission to disclose material facts concerniug the matters in controversy, or that the agreement was entered into under any misapprehension or mistake on the part of the defendant. The finding of the jury distinctly negatives all fraudulent or unfair practices by the plaintiffs or either of them in procuring the defendant to execute and deliver the agreement of compromise. Averments in the answer, not responsive to the allegations in the bill, or setting up new matter in avoidance of the case made by the plaintiffs, must be supported by proof; otherwise, they cannot be regarded in adjudicating on the rights of parties at a hearing upon an issue of fact. It is only when the defendant denies allegations in the bill under oath, that the answer, in the absence of evidence, is deemed to be conclusive. We see no sufficient reason in any of the facts which are duly proved or admitted, to justify us in withholding from the plaintiffs the relief which they seek, on the ground of any want of equity.

Nor have we any doubt as to the right of the plaintiffs to ask for the enforcement of this contract by a decree in chancery. The remedy at law is not adequate and complete. The agreement is not one for the transfer of shares in a corporation merely. It is a contract also for the conveyance of a certain right or interest in real estate, which is an appropriate subject for specific relief in equity. The court has jurisdiction to decree that the land which is the subject of the agreement shall be conveyed to the plaintiffs; and, as it will give relief for this part of the contract, it will also entertain jurisdiction of the whole agreement, and enforce the other stipulations respecting the transfer of shares in the incorporated companies named in the bill, instead of turning the party over to seek his remedy therefor by an action at law. The more recent authorities are quite decisive as to the authority of a court of chancery to decree the specific performance of a contract for the transfer of shares in joint stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount and the number of shares is limited. Duncuft v. Albrecht, 12 Sim. 189. Shaw v. Fisher, 2 De Gex & Sm. 11, and 5 De Gex, Macn. & Gord. 596. Cheale v. Kenward, 3 De Gex & Jon. 27. But without deciding whether a suit in equity can be supported for the sole purpose of enforcing a contract for the sale of shares in a corporation, we are of opinion that such an agreement may be enforced in equity when it forms part of a contract for the sale and transfer of real estate, and the suit is brought for the conveyance of the land as well as for the transfer of the shares. Decree accordingly.

(See, also, Stapilton v. Stapilton, 1 Atk. 2; McKinley v. Watkins, 13 Ill. 140; Kerr v. Lucas, 1 Allen, 279; Blake v. Peck, 11 Vt. 483; Wistar's Appeal, 80 Pa. St. 484.)

## Payment of money made under mistake of law.

(40 N. W. Rep. 567, 39 Minn. 461.)

ERKENS v. NICOLIN.

Supreme Court of Minnesota. Nov. 28, 1888.

1. Money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, and both parties knew all the facts.

2. Applied to a case where a party, under ignorance of the rule of law that distances must yield to natural boundaries called for in the deed, paid money for a quitclaim of property which, under this rule, already belonged to him.

Appeal by defendant from an order of the district court for Scott county, Edson, J., presiding, refusing a new trial after a trial by the court.

Peck & Brown, for appellant. E. Southworth, for respondent.

MITCHELL, J. Action to recover back the money paid by plaintiff to defendant for a quitclaim deed of a piece of land in the village of Jordan. The facts, as disclosed by the evidence, are that defendant platted into lots a tract of land, of which he was the owner, lying between Water street and Sand creek. As shown upon the plat, the north and south lines of the lots extend from Water street to the creek. The distance marked on the plat gave the length of these lines as 80 feet, but the actual distance from Water street to the creek was 110 feet. One of these lots, and the adjoining 35 feet of another, had been conveyed by defendant, according to the plat, to plaintiff or plaintiff's grantor. Subsequently defendant claimed and stated to plaintiff, in substance, that the lots only extended back 80 feet, according to the distance indicated on the plat, and hence that he still owned the strip of 30 feet next to the creek. Plaintiff knew that defendant's claim was based wholly upon the theory that the distance given on the plat would control, and hence that his claim of title was in fact but expressions of opinion as to the legal effect and construction to be given to the plat. So far as the evidence shows, defendant made this claim in good faith, and honestly supposed that his deeds of the lots only conveyed 80 feet. Plaintiff took the matter under consideration for nearly a month, and went to the register's office and examined the plat for himself. He then obtained from defendant and wife a quitclaim deed of all the land down to the creek, and paid therefor the money which he now seeks to recover. When he paid the money he knew all the facts, and had the same means of knowledge of them which defendant had. The transaction was unaffected by any fraud, trust, confidence, or the like. The parties dealt with each other at arm's length. Plaintiff was not laboring under any mistake of facts. He took the deed and paid his money under a mistake of law as to his antecedent existing legal rights in the property, supposing that, according to the proper legal construction of the plat, the lots were only 80 feet deep. However, under the doctrine of Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. Rep. 33, since decided by this court, it is now settled that a deed of lots according to this plat would cover all the land down to the creek, under the rule that distances must yield to natural boundaries called for in a deed. We are unable to see that this case differs in principle from Perkins v. Trinka, 30 Minn. 241, 15 N. W. Rep. 115, and Hall v. Wheeler, 37 Minn. 522, 35 N. W. Rep. 377.

It is unnecessary to enter into any discussion of the question (left in great confusion in the books) when, if ever, relief will be granted on the ground of mistake in law alone, or whether there is any difference between mistake of law and ignorance of law, or between ignorance or mistake as to a general rule of law and ignorance or mistake of law as to existing individual rights in the property which is the subject-matter of the contract. We hold that money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, but both parties acted in good faith, knew all the facts, and had equal means of knowing them, especially where, as was evidently the fact in this case, the transaction was intended to remove or settle a question of doubt as to title. It would be impossible to foresee all the consequences which would result from allowing parties to avoid their contracts in such cases on the mere plea of ignorance or mistake of law affecting their rights. It would be difficult to tell what titles would stand, or what contracts would be binding, if grantors and grantees were at liberty to set up such a plea. This may seem to work inequitably in the present case, but more mischief will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles.

Order reversed.

(See, also, 2 Pom. Eq. Jur. § 842; 1 Whart. Cont. § 198; Bisp. Eq. § 189; Freeman v. Curtis, 51 Me. 140; Haven v. Foster, 9 Pick. 112; Bank of U. S. v. Daniel, 12 Pet. 32; Lamborn v. Com'rs, 97 U. S. 181; Pinkham v. Gear, 3 N. H. 163; Clarke v. Dutcher, 9 Cow. 674; Real Estate Inst. v. Linder, 74 Pa. St. 371; Gibbons v. Caunt, 4 Ves. 849; Stevens v. Lynch, 12 East, 38.)

(Examine carefully Northrop v. Graves, 19 Conn. 548.)

## (b) MISTAKE OF FACT.

**Equity grants relief where there has been a mistake as to matters of fact; but to warrant such relief (1) the fact must have been a material one, which controlled the action of the party asking the relief; (2) the mistake must not have been the result of his own negligence; (3) he must announce his purpose to rescind his contract at once on discovering the mistake; and (4) there must exist in the facts and circumstances of the case an imperative demand for equitable interference.**

(93 U. S. 55.)

GRYMES v. SANDERS et al.

Supreme Court of the United States. Oct. Term, 1876.

Appeal from the circuit court of the United States for the eastern district of Virginia.

Conway Robinson and Mr. Leigh Robinson, for appellant. Edwin L. Stanton and George M. Dallas, for appellees.

Mr. Justice SWAYNE. The appellant was the defendant in the court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was on his part any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others.

The case rests entirely upon the ground of mistake. The question presented for our determination is whether that mistake was of such a character, and attended with such circumstances, as entitle the appellees to the relief sought by their bill and decreed to them by the court below.

Peyton Grymes, the appellant, owned two tracts of land in Orange county, Va., lying about twenty-five miles from Orange court-house. The larger tract was regarded as valuable, on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the appellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above $20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself at the court-house upon their arrival. The conveyance was provided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court-house in time to take a designated train east the ensuing day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court-house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface-gold, and then took him to an abandoned shaft, which he supposed was on the premises. There Fisher examined the quartz and other debris lying about. But a very few minutes had elapsed when Grymes announced that his team was ready. The party immediately started back to the court-house. Arriving too late for the train, they drove to the house of the appellant: and Fisher remained there until one o'clock that night. While Fisher was there, considerable conversation occurred between him and the appellant in relation to the property; but it does not appear that any thing was said material to either party in this controversy. Fisher proceeded to Philadelphia, and reported favorably to Lanagan, and subsequently, at his request, to Repplier, who became a party to the negotiation. He represented to both of them that the abandoned shaft was upon the premises. Catlett went to Philadelphia, and there he sold the property to the appellees for $25,000. Fisher was sent to the court-house to investigate the title. He employed Mr. Williams, a legal gentleman living there, to assist him. A deed was prepared by Mr. Williams, and executed by the appellant on the 21st of March, 1866. On the 7th of April ensuing, the appellees paid over $12,500 of the purchase-money, and gave their bond to the appellant for the same amount, payable six months from date, with interest. The deed was placed in the hands of a depositary, to be held as an escrow until the bond should be paid. Catlett, under a power of attorney, received the first installment, paid over to the appellant $10,000, and retained the residue on account of the compensation to which he was entitled under the contract between

them. The vendees requested Hume to hold possession of the property for them until they should make some other arrangement. He occupied the premises until the following July, when, with their consent, he transferred the possession to Gordon. In that month, Lanagan and Repplier came to see the property. Hume was there washing for gold. He began to do so with the permission of the appellant before the sale, and had continued the work without intermission. The appellees desired to be shown the boundary-lines. Hume said he did not know where they were, and referred them to Johnson. Johnson came. The appellees desired to be taken to the shaft which had been shown to Fisher. Johnson said it was not on the premises. Hume thought it was. Johnson was positive; and he was right. The appellees seemed surprised, but said little on the subject. They proceeded to examine the premises within the lines, and, before taking their departure, employed Gordon to explore the property for gold. Subsequently this arrangement was abandoned, and they paid him for the time and money he had expended in getting ready for the work. In September, they sent Bowman as their agent to make the exploration. On his way, he stopped at the court-house, and told the appellant that the shaft shown to Fisher as on the land was not on it. The appellant replied instantly, "that there was no shaft on the land he had sold to Repplier and Lanagan, and that he had never represented to any one that there was a shaft on the land, and that he had never authorized any one to make such a representation, nor did he know or have reason to believe that any such representation had, in fact, been made by any one." It does not appear that his attention had before been called to the subject, or that he was before advised that any mistake as to the shaft had occurred. Bowman spent some days upon the land, and made a number of cuts, all of which were shallow. The deepest was only fifteen feet in depth. It was made under the direction of Embry and Johnson, two experienced miners living in the neighborhood. It reached a vein of quartz, but penetrated only a little way into it. They thought the prospect very encouraging, and urged that the cut should be made deeper.

Bowman declined to do anything more, and left the premises. No further exploration was ever made. Johnson says, "I know the land well, and know there has been gold found upon it, and a great deal of gold, too,—that is to say, surface-gold,—but it has never been worked for vein-gold. The gold that I refer to was found by the defendant, Grymes, and those that worked under him." He considered Bowman's examination "imperfect and insufficient." He had had "twenty-three years' experience in mining for gold."

Embry's testimony is to the same effect, both as to the surface-gold and the character of the examination made by Bowman. The premises lie between the Melville and the Greenwood Mines. Before the war, a bucket of ore, of from three to four gallons, taken from the latter mine, yielded $2,400 of gold. This, however, was exceptional. In the spring of 1869 a vein was struck, from forty to fifty feet below the surface, yielding $500 to the ton. Work was stopped by the influx of water. It was to be resumed as soon as an engine, which was ordered, should arrive. Ore at that depth, yielding from eight to ten dollars a ton, will pay a profit. Embry says he is well acquainted with the courses of the veins in the Melville and the Greenwood Mines, and that "the Greenwood veins do pass through the land in controversy, and some of the Melville veins do also." Speaking of Bowman and his last cut, he says:—

"At the place I showed him where to cut he struck a vein, but just cut into the top of it; he did not go down through it, or across it. From the appearance of the vein, I was very certain that he would find gold ore, if he would cut across it and go deep into it, and I told him so at the time; but he said that they had sent for him to return home, and he couldn't stay longer to make the examination, and went off, leaving the cut as it was; and the exploration to this day has never been renewed. I am still satisfied, that, whenever a proper examination is made, gold, and a great deal of it, will be found in that vein; for it is the same vein which passes through the Greenwood Mine, which was struck last spring, and yielded $500 to the ton. His examination in other respects, as well as this, was imperfect and insufficient. I don't think he did any thing like making a proper exploration for gold. I don't think he had more than three or four hands, and they were not engaged more than eight or ten days at the utmost."

In September, 1866, Repplier instructed Catlett to advise the appellant, that, by reason of the mistake as to the shaft, the appellees demanded the return of the purchase-money which had been paid. In the spring of 1867, Lanagan, upon the same ground, made the same demand in person. The appellant replied, that he had parted with the money. He promised to reflect on the subject, and address Lanagan by letter. He did write accordingly, but the appellees have not produced the letter. This bill was filed on the 21st of March, 1868.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be re-

lieved. Kerr on Mistake and Fraud, 408; Trigg v. Read, 5 Humph. 529; Jennings v. Broughton, 17 Beav. 241; Thompson v. Jackson, 3 Rand. 507; Harrod's Heirs v. Cowan, Hardin, 553; Hill v. Bush, 19 Barb. (Ark.) 522; Juzan v. Toulmin, 9 Ala. 662.

Does the case in hand come within this category?

When Fisher made his examination at the shaft, it had been abandoned. This was prima facie proof that it was of no account. It does not appear that he thought of having an analysis made of any of the debris about it, nor that the debris indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises, they said nothing about abandoning the contract, and nothing which manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan saw and talked several times with Williams, who had prepared the deed. Williams says, "I cannot recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Houseworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." Kerr on Fraud and Mistake, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary-lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In Shirley v. Davis, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See also Seton v. Slade, 7 Ves. 269; 2 Kent's Com. 485; 1 Story's Eq., sects. 146, 147; Attwood v. Small, 6 Cl. & Fin. 338; Jennings v. Broughton, 17 Beav. 234; Campbell v. Ingilby, 1 De G. & J. 405; Garrett v. Burleson, 25 Tex. 44; Warner v. Daniels et al., 1 Woodb. & M. 91; Ferson v. Sanger, id. 139; Lamb v. Harris, 8 Ga. 546; Trigg v. Read, 5 Humph. 529; Haywood v. Cope, 25 Beav. 143.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. Thomas v. Bartow, 48 N. Y. 200; Flint v. Woodin, 9 Hare, 622; Jennings v. Broughton, 5 De G., M. & G. 139; Lloyd v. Brewster, 4 Paige, 537; Saratoga & S. R. R. Co. v. Row, 24 Wend. 74; Minturn v. Main, 3 Seld. 220; 7 Rob. Prac., c. 25, sect. 2, p. 432; Campbell v. Fleming, 1 Ad. & El. 41; Sugd. Vend. (14th ed.) 335; Dimau v. Providence, W. & B. R. R. Co., 5 R. I. 130.

A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured

the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant. Hunt v. Silk, 5 East, 452; Minturn v. Main, 3 Seld. 227; Okill v. Whittaker, 2 Phill. 340; Brisbane v. Dacres, 5 Taunt. 144; Andrew v. Hancock, 1 Brod. & B. 37; Skyring v. Greenwood, 4 Barn. & C. 289; Jennings v. Broughton, 5 De G., M. & G. 139.

The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. Segur v. Tingley, 11 Conn. 142; Haywood v. Cope, 25 Beav. 140; Jennings v. Broughton, 17 id. 234; Attwood v. Small, 6 Cl. & Fin. 497; Marvin v. Bennett, 8 Paige, 321; Thomas v. Bartow, 48 N. Y. 198; Hunter v. Goudy, 1 Ham. 451; Hall v. Thompson, 1 Sm. & M. 481.

The bill, we have shown, cannot be maintained.

In our examination of the case, we have assumed that those who are alleged to have spoken to the agent of the appellees upon the subject of the shaft, before the sale, had the requisite authority from the appellant.

Considering this to be as claimed by the appellees, our views are as we have expressed them. We have not, therefore, found it necessary to consider the question of such authority; and hence have said nothing upon that subject, and nothing as to the aspect the case would present if that question were resolved in the negative.

Decree reversed, and case remanded with directions to dismiss the bill.

(See, also, M'Ferran v. Taylor, 7 U. S. [3 Cranch,] 270, note; 1 Story, Eq. Jur. § 140, note.)

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## Payments on money made under mistake of fact.

(46 N. W Rep. 364, 44 Minn. 278.)

COBB et al. v COLE.

Supreme Court of Minnesota. Aug. 19, 1890.

1. A mistake of fact in an accounting between copartners upon dissolution of the partnership affords ground for relief in equity, irrespective of any express agreement that mistakes should be corrected.

2. In an equitable action, specific issues having been tried before a jury by order of the court, leaving other material issues untried, the court, upon the verdict of the jury, ordered judgment for the defendant. *Held*, that the plaintiffs were not entitled to a new trial for such error, but only to a trial of the untried issues, upon motion being made therefor.

3. The court may direct specific issues, in an equitable action, to be tried by a jury.

(*Syllabus by the Court.*)

Appeal by plaintiffs from an order of the district court for Dakota county; Crosby, J., presiding, refusing a new trial.

Cole, Bramhall & Morris, for appellants. Hodgson & Schaller, for respondent.

DICKINSON, J. It appears from the pleadings that the plaintiffs and the defendant had formerly been engaged in partnership business. The partnership was dissolved by mutual consent, it being agreed, as is alleged in the complaint, that the defendant should retire from the firm, and sell his interest therein to them; that he should pay to the plaintiffs "such sum as would make his interest in said firm equal to that of each of the plaintiffs therein, to-wit, one-third interest," (except as to a matter which need not be particularly referred to,) and the plaintiffs were to pay defendant "a sum equal to his one-third interest in the firm business, as the same then appeared upon the books of the firm." The complaint alleges that a statement was made, from the books, of the resources and liabilities of the firm and of the interest of each partner therein; and that, relying upon the correctness of that statement, the plaintiffs paid to the defendant the amount thus appearing to be the value of the defendant's interest, it having been mutually agreed that if any errors should be discovered in the statement they should be corrected. The complaint then alleges the existence of errors in the statement, since discovered, which rendered the result of the computation of the defendant's interest in the partnership erroneous to the extent of more than $1,400, as appears from the books of the firm, by reason of which mistake the plaintiffs overpaid the defendant in an amount stated, which they seek to recover in this action. The defendant put in issue (1) the alleged mistake; (2) the allegation that he agreed to pay to the plaintiffs such sum as would make his interest equal to that of each of the plaintiffs; (3) the allegation of an agreement that any errors in the statement of the accounts should be corrected; and (4) the defendant alleged that the plaintiffs, having charge of the books of the firm, and representing to the defendant the state of the accounts, which they professed to know, offered to pay to the defendant a specified sum for his interest in the partnership business, (excepting as to certain matters,) which sum, being accepted by him, was paid. When the cause was called for trial the defendant demand-

ed a trial of all the issues by a jury. The plaintiffs moved the trial of the cause by the court. The court, in terms, denied both motions, and directed that these two issues be submitted to a jury: *First*, whether there was any express agreement between the parties that errors which might be discovered in the statement of the accounts should be corrected; and, *second*, whether the defendant agreed to pay to the plaintiffs such sum as would make his interest in the firm equal to that of each of the plaintiffs. The court added that the other issues in the action would be tried by the court or a referee, as the court might determine. A jury was then called, and the trial proceeded before the jury. When the evidence was closed the court instructed the jury as to the two issues submitted to them. The jury returned a negative answer to each of the questions put to them. Some time subsequently the plaintiffs moved the court that the findings of the jury be disregarded as immaterial, and that the court try the case without a jury, as a court case. The defendant at the same time moved the court for judgment in his favor "upon the evidence and the findings of the jury." The court denied the motion of the plaintiffs, but directed judgment to be entered in favor of the defendant "upon the findings of the jury," the court considering that the findings of the jury disposed of the whole case. The plaintiffs then moved for a new trial, which was refused, and from that refusal this appeal is taken.

We do not understand that judgment was in fact entered. The action was of an equitable nature, properly triable by the court. It involved, aside from the specific issues submitted to the jury, the issue as to whether there had been a mutual mistake of fact as to the state of the accounts by reason of which the plaintiffs had been led to pay to the defendant more than, by the terms of the agreement, the latter was entitled to. That would constitute a cause of action, even though there were no express agreement that if mistakes should be discovered they should be corrected. The attention of the court seems to have been diverted from the alleged mistake, as of itself entitling the plaintiffs to a remedy in equity, by the allegation of an express agreement that mistakes should be corrected, upon which the defendant joined issue. The determination of the issue as to the express agreement left the issue of mistake in fact still undetermined, and judgment should not have been entered upon the special verdict which did not fully decide the issues in the case. It is obvious from the statement we have made of the case that the only issues tried were the two which were submitted to the jury. But the plaintiff's motion for a new trial of the cause was properly refused, for the plaintiffs were only entitled to a trial of the issues as yet untried. The court had authority, of its own motion, to direct the trial of specific questions by a jury, as it did do, (Gen. St. 1878, c. 66, § 217;) and we find no error justifying a new trial. While it may be probable, from the fact that the court ordered judgment to be entered on the verdict of the jury, that the court would have refused to try the issues which had not been tried, still the order refusing a new trial was not erroneous, and should be affirmed. The order for judgment was probably erroneous, for the reasons above stated, but that error is not reached by a motion for a new trial. Order affirmed.

A motion for reargument of this case was denied October 7, 1890.

(See, also, 2 Pom. Eq. Jur. § 869; Adams, Eq. § 188; 1 White & T. Lead. Cas. Eq. § 197; Pearson v. Lord, 6 Mass. 84; Waite v. Leggett, 8 Cow. 195; Mayor v. Erben, 38 N. Y. 305; Burr v. Veeder, 3 Wend. 412; Lazell v. Miller, 15 Mass. 208; Bell v. Gardiner, 4 Man. & G. 11.)

(As to the power of equity to reform instruments on the ground of mistake, see Glass v. Hulbert, 102 Mass. 24; Hoppough v. Struble, 60 N. Y. 430; Burgin v. Giberson, 26 N. J. Eq. 72; Miner v. Hess, 47 Ill. 170; Gerdine v. Menage, 41 Minn. 417, 43 N. W. Rep. 91; Olson v. Erickson, 42 Minn. 440, 44 N. W Rep. 317; Rice v. Kelset, 42 Minn. 511, 44 N. W. Rep. 535.)

(Mistake as to boundaries. Caufield v. Clark, [Or.] 21 Pac. Rep. 443; Levy v. Yerga, [Neb.] 41 N. W. Rep. 778.)

(Description. Knight v. Glasscock, [Ark.] 11 S. W. Rep. 580; Barth v. Deuel, [Colo. Sup.] 19 Pac. Rep. 471.)

(To secure equitable relief, strong proof of the right must be produced. Giles v. Hunter, [N. C.] 9 S. E. Rep. 549.)

# FRAUD.

**"Fraud in equity includes all willful or intentional *acts*, *omissions*, and *concealments*, which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained."** 2 Pom. Eq. Jur. § 873.

## I. ACTUAL FRAUD.

### (*a*) FRAUDULENT MISREPRESENTATIONS.

**If one party states that to be true which he knows to be false, in order to induce the other party to act as he otherwise would not act, such statement respecting a material fact is of course fraudulent, and furnishes ground for equitable relief.**

(30 N. J. Eq. 82.)

PERKINS v. PARTRIDGE et al.

Court of Chancery of New Jersey. Oct. Term, 1878.

Bill for relief. On final hearing, on pleadings and proofs.

B. A. Vail, for complainant. S. M. Dickinson, for defendants.

THE CHANCELLOR. The complainant seeks to set aside a conveyance made by him to Charles F. Partridge, on the 1st of August, 1875, whereby he conveyed in fee to the latter his house and lot in Woodbridge township, in the county of Middlesex, for the consideration (including the price of certain household furniture sold with the property) of $10,000, subject, however, to a mortgage of $3,000 thereon. For the balance, $7,000, of the purchase-money, after deducting the amount of the mortgage, he agreed to receive, and did receive accordingly, a mortgage of that amount then held by the defendant, Charles Partridge, father of the grantee, on nineteen hundred and twenty acres of wild land in Brown's tract, in Herkimer county, New York. The ground of the complainant's complaint is that he was induced to accept the last-mentioned mortgage through false and fraudulent representations in reference thereto made by the defendants. These representations, according to the bill, were, that the property was a good and safe security for the money the payment of which the mortgage purported to secure; and that the mortgaged land was sold by Charles Partridge to the mortgagor at the rate of $25 an acre. The bill alleges that, in fact, the mortgagor (who was also the obligor in the bond therein mentioned, and the payment of which it was made to secure) was a man of no pecuniary responsibility; and that the mortgaged premises were not sold by Charles Partridge for any such sum of money as the defendants represented, and were worth only about $2,000.

That the complainant was defrauded by the representations of the defendants, is clear from the evidence. His property was brought to the notice of Charles F. Partridge by Frederick Reed, a real estate agent, to whom Partridge had applied with a view to obtaining an exchange of some Brooklyn property of his for country property. Reed had the complainant's property also in hand to find a purchaser for it. He mentioned to each of the parties the property of the other, with a view to exchange. The complainant was not satisfied to exchange at the price at which the Brooklyn property was held. This was communicated by the agent to Partridge, who then said he had made up his mind to retain his Brooklyn property and get a country place in some other way. He then said that "his father (the defendant, Charles Partridge,) had a mortgage of $7,000 on land in Herkimer county which was good, which he would put in in exchange; that his father would let him have it to use, but not for a cent less than the face of it; and that he would have to pay his father for it." After the contract was signed, and on the day when the deed was delivered and before the papers were exchanged, the complainant and Charles F. Partridge and his father being then at the lawyer's office to exchange the papers, Reed, who was there also, sought and obtained a private interview with Charles Partridge, the father (who seems to have interested

himself in getting the contract drawn and signed), and then said to him that the complainant, as he, Reed, had learned, knew nothing about the $7,000 mortgage, had had no time to search the title or investigate the matter at all, and would have to rely entirely on what he, Partridge, said about it. Partridge then said that it was a perfectly good, first-class mortgage; that the parties were good, and that the interest had always been paid promptly; and that he had sold the land for $25 an acre, and would not sell any more of the tract for less than $30 an acre. Reed thereupon informed the complainant of the purport of the conversation, and the deed was then delivered and the mortgage accepted. The complainant testifies that Charles Partridge came to see his property bef· 'e the contract was entered into, and then mentioned the mortgage to him, saying that it was a good mortgage, and that he had sold the land on which it was for $25 an acre. The complainant testifies that Charles F. Partridge told him, both before and after the conveyance had been made, that he would have to pay his father $7,000 for the mortgage; that $6,999 would not buy it. The complainant's wife corroborates him in this statement as to one occasion, she having been present when Charles F. Partridge said substantially the same thing to him. The fact appears to be that Charles Partridge not only did not sell the mortgaged premises for $25 an acre, but did not sell them at all. He swears, indeed, that he sold them to the mortgagor, Thomas H. Phillips, and the deed to the latter probably (it has not been laid before me) expresses a consideration in accordance with the representations, but it is evident that there was no bona fide sale at all. Charles Partridge, indeed, swears that Phillips paid something, besides giving the mortgage, as consideration, but admits that it was only from $10 to $25, and though he further says that Phillips agreed to pay $15 or $20 an acre, Phillips swears that he gave no consideration except the mortgage. It seems extremely probable that the conveyance to Phillips was made merely in order to obtain a mortgage from an apparent purchaser. Charles Partridge testifies that he made an exchange of the property with certain persons whom he designates as Charles F. Bouton and De Witt H. Phillips (though the conveyance to Thomas H. Phillips had then been made), and that he gave Thomas H. Phillips a consideration for conveying directly to them. It appears that he gave him about $50 for his trouble in the matter. Thomas H. Phillips says that he thinks the conveyance to Bouton and Phillips was made on the same day on which the property was conveyed to him. The deed to Bouton and Phillips has never been put on record, and neither of the defendants can give any trustworthy account of either of those persons.

The statement made by the defendants, of the manner in which the son accounted to the father for the value of the mortgage, is unsatisfactory.

Again, there is evidence of fraudulent design in the endorsements of interest made by Charles Partridge on the bond. Six months' interest is endorsed thereon as having been received in September (the word, however, is written over the word "March"), 1874, from Thomas H. Phillips, and the same amount from him on the 7th of April, 1875, while the evidence is that Thomas H. Phillips conveyed away the property on the same day on which it was conveyed to him, March 6, 1874, and he swears that he never paid Charles Partridge, or any one else, any interest on the mortgage. It is worthy of remark, in this connection, that Charles Partridge says, in his testimony, that he received this interest of Bouton and Phillips, and that the Phillips of that firm was not Thomas H. Phillips. No interest has been paid on the mortgage since it was assigned to the complainant.

The mortgaged premises appear to have been valued, in 1866, at $2 an acre, and their value consisted, principally, in the bark of the hemlock trees growing on them. The right to this bark was reserved by the grantors, in the deed to Partridge, and the bark has since been taken away by them. The land, therefore, appears to be of little, if any, value. Nor are the representations which were made by the defendants to induce the complainant to accept the mortgage, to be regarded as mere "dealing talk" —simplex commendatio. They were substantial, important representations as to existing facts, materially affecting the character and value of the mortgage. That the mortgaged premises had been sold, by the mortgagee, to the mortgagor for about $50,000; that the property was first-rate property; that the land was good and the timber valuable; that the land would be more valuable after it was cleared; that the mortgage was a good mortgage—all these are false allegations as to the existence of material facts.

By means of these false and fraudulent representations, made, it is evident, for the purpose of inducing the complainant to accept the mortgage as $7,000 of the purchase-money of his property, the defendants were enabled to obtain the conveyance of that property. The complainant made no investigation as to the character of the mortgage, or the value of the mortgaged premises, because of his confidence in those representations, and it appears that the defendants were anxious and in haste to close up the transaction and obtain a deed for his property. The complainant has been guilty of no laches to debar him from relief. It appears, from the testimony, that, by the agreement, Charles F. Partridge was to have the interest which would become due on the mort-

gage on the 6th of September, 1875. The principal of the mortgage was not due until March 6, 1877. The bill was filed on the 16th of December, 1875. The complainant, before filing the bill, and after he found that he could collect no interest on the mortgage, requested Charles F. Partridge to reconvey the Woodbridge property to him, offering to reassign to him the mortgage, but Partridge refused. The complainant is entitled to relief. The deed should be set aside and a reconveyance to the complainant ordered on the complainant's re-assigning the bond and mortgage to the defendant, Charles F. Partridge. He, according to the testimony of his father, purchased it of him, and has paid him therefor in full. Charles F. Partridge must account, also, for the use and occupation of the house and lot conveyed to him by the complainant, and for the value of the household furniture. The defendants will be decreed to pay costs.

(See, also, 2 Pom. Eq. Jur. § 886; Patch v. Ward, L. R. 3 Ch. App. 203-207; Rawlins v. Wickham, 3 De Gex & J. 304-312; Evans v. Bicknell, 6 Ves. 174-182; Wampler v. Wampler, 30 Grat. 454; Smith v. Richards, 13 Pet. 26-36; Frenzel v. Miller, 37 Ind. 1.)

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## Where, to influence another to act, one party makes a statement respecting a material fact, as though of his own knowledge, when in fact he does not know whether it is true or false, such statement, if untrue, is fraudulent, and is ground for equitable relief.

(10 Pac. Rep. 290, 9 Colo. 33.)

STIMSON v. HELPS et al.

Supreme Court of Colorado. Feb. 26, 1886.

1. The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury.

2. It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false, if such party made the false representation not knowing whether it was false or not.

3. The action of the county court in refusing to allow an appeal to the district court after the party seeking it had given notice of an appeal to the supreme court, and time has been allowed in which to perfect it, is not an error upon such appeal to the supreme court.

Appeal from county court, Boulder county.

The complaint sets out that on the sixth day of October, 1881, William Stimson leased to the defendants in error the S. W. ¼ of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon,—made buildings, laid tracks, etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defendant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company; that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth $2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased them, and thereby deceived them, and damaged them, in the sum of $2,000. Issue joined, and trial to the court. Motion by defendant's counsel for judgment on the pleadings, and evidence overruled. Judgment for the plaintiffs in the sum of $2,000, and costs.

Wright & Griffin, for appellant. G. Berkley, for appellees.

ELBERT, J. The law holds a contracting party liable as for fraud on his express representations concerning facts material to the

treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. Bigelow, Fraud, 57, 60, 63, 67, 68, 87; Kerr, Fraud & M. 54 et seq.; 3 Wait, Act. & Def. 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent. Kerr, Fraud & M. 54 et seq., and cases cited; Bigelow, Fraud, 63, 84, 453; 3 Wait, Act. & Def. 438 et seq.; 2 Estee, Pr. 394 et seq. "Fraud" is a term which the law applies to certain facts, and where, upon the facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. Kerr, Fraud & M. 366 et seq., and cases cited; 2 Estee, Pl. 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

[Note from 10 Pac. Rep. 292.]

A contract secured by false and fraudulent representations cannot be enforced. Mills v. Collins, 67 Iowa, 164, 25 N. W. Rep. 109.

A court of eqnity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice. But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. Seeley v. Reed, 25 Fed. Rep. 361.

When, by false representations or misrepresentations, a fraud has been committed, and by it the complainant has been injured, the general principles of equity jnrisprndence afford a remedy. Singer Mannf'g Co. v. Yarger, 12 Fed. Rep. 487. See Chandler v. Childs, 42 Mich. 128, 3 N. W. Rep. 297; Cavender v. Roberson, 33 Kan. 626, 7 Pac. Rep. 152.

When no damage, present or prospective, can result from a fraud practiced, or false representations or misrepresentation made, a court of equity will not entertain a petition for relief. Dunn v. Remington, 9 Neb. 82, 2 N. W. Rep. 230.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486.

Equity will not relieve against a misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion, open to the inquiry and examination of both parties. Buckner v. Street, 15 Fed. Rep. 365.

False representations may be a ground for relief, though the person making them believes them true, if the person to whom they were made relied upon them, and was induced thereby to enter into the contract. Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. Rep. 482.

Fraudulent representations or misrepresentations are not ground for relief, where they are immaterial, even though they be relied upon. Hall v. Johnson, 41 Mich. 286, 2 N. W. Rep. 55. See, to same effect, Lynch v. Mercantile Trust Co., 18 Fed. Rep. 486; Seeberger v. Hobert, 55 Iowa, 756, 8 N. W. Rep. 482.

In fraudulent representation or misrepresentation the injured parties may obtain relief, even though they did not suppose every statement made to them literally true. Heineman v. Steiger, 54 Mich. 232, 19 N. W. Rep. 965.

Where the vendor honestly expresses an incorrect opinion as to the amount, quality, and value of the goods he disposes of in a sale of his business and good-will thereof, and the purchaser sees or knows the property, or has an opportunity to know it, no action for false representations will lie. Collins v. Jackson, 54 Mich. 186, 19 N. W. Rep. 947.

Mere "dealing talk" in the sale of goods, unless accompanied by some artifice to deceive the purchaser or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not amount to misrepresentation. Reynolds v. Palmer, 21 Fed. Rep. 433.

False statements made at the time of the sale by the vendor of chattels, with the fraudulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel. Bank v. Yocum, 11 Neb. 328, 9 N. W. Rep. 84.

A statement recklessly made, without knowledge of its truth, is a false statement knowing-

ly made, within the settled rule. Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. Rep. 360.

Whether or not omission to communicate known facts will amount to fraudulent representation depends upon the circumstances of the particular case, and the relations of the parties. Britton v. Brewster, 2 Fed. Rep. 160.

Where a vendor conceals a material fact, which is substantially the consideration of the contract, and which is peculiarly within his knowledge, it is fraudulent misrepresentation. Dowling v. Lawrence, 58 Wis. 282, 16 N. W. Rep. 552.

Evidence of fraudulent representations must be clear and convincing. Wickham v. Morehouse, 16 Fed. Rep. 324.

Where a man sells a business, and the contract of sale contained a clause including all right to business done by certain agents, evidence that the seller was willing to engage in the same business with such agents is not proof of fraud in making the contract. Taylor v. Saurman, 110 Pa. St. 3, 1 Atl. Rep. 40.

It was recently held by the supreme court of Indiana, in the case of Cook v. Churchman, 104 Ind. 141, 3 N. E. Rep. 759, that where money is obtained under a contract, any fraudulent representations employed by a party thereto as a means of inducing the loan to be made, if otherwise proper, are not to be excluded because of the statute of frauds; also that where parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute of fraud applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such person with the expectation of obtaining some incidental benefit for himself.

(See, also, Knappen v. Freeman, 47 Minn. 491, 50 N. W. Rep. 533; Stone v. Covell, 29 Mich. 359; Beebe v. Knapp, 28 Mich. 52; Bennett v. Judson, 21 N. Y. 238.)

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**Where, to influence another to act, one party makes a statement respecting a material fact, the truth or falsity of which is peculiarly within his own knowledge, such statement, if untrue, is fraudulent and ground for equitable relief, even though the party believed the statement to be true at the time he made it.**

(19 Minn. 32, Gil. 14.)

KIEFER v. ROGERS et al.

Supreme Court of Minnesota. Jan., 1872.

1. R. sold real estate to K., representing that there was but one mortgage on it, when in fact there were two. He was ignorant of the second mortgage, but his ignorance arose from his gross neglect to read a mortgage executed by him, in which the real estate had been inserted. *Held*, a fraud. [Faribault v. Sater, 13 Minn. 223, Gil. 210. Brooks v. Hamilton, 15 Minn. 26, Gil. 10.]

2. Although incumbrances on real estate may be of record, a purchaser has a right to rely on the vendor's representations as to the incumbrances. [Kelly v. Rogers, 21 Minn. 146. Porter v. Fletcher, 25 Minn. 493.]

3. An action by a grantee to rescind on the ground of fraud may be maintained without a previous offer to reconvey. [Faribault v. Sater, 13 Minn. 223, Gil. 210. Brooks v. Hamilton, 15 Minn. 26, Gil. 10.]

4. In such case a tender by plaintiff of a quit-claim deed with a nominal consideration, and with covenants against the acts of plaintiff, is sufficient.

5. A refusal of permission to amend the answer at the trial *held* proper.

6. In an action to rescind for fraud, property the title of which is in defendant's wife may be charged with so much of the proceeds of plaintiff's property given in exchange for that conveyed to him, as was used in purchasing the property so vested in her.

Appeal by defendants from a judgment of the district court, Ramsey county.

The action was to rescind a transaction in which the defendant Griff H. sold and conveyed to plaintiff certain real estate in Washington county, and in consideration thereof plaintiff transferred to defendant certain leasehold property in Ramsey county and a stock of goods, to recover the stock of goods, and have a lien decreed him upon real estate of Mrs. Rogers, paid for in part by defendant's transfer of said leasehold interest.

The property conveyed to plaintiff had at the time two mortgages upon it,—one for $4,000, and one for $2,250. The defendant Griff in the negotiation represented that the $4,000 mortgage was the only incumbrance on the real estate, and against this he agreed to indemnify the plaintiff. The plaintiff relied on this representation, received defendants' conveyance of the real estate, with a bond to indemnify him against the $4,000 mortgage, and transferred to defendant Griff a stock of goods and certain leasehold property held by him in Ramsey county. The defendant, though he executed the $2,250 mortgage, was actually ignorant that the real estate in question was included in it, he having executed under the circumstances stated in the opinion. He afterwards exchanged the leasehold property, with real estate of the defendant Mrs. Rogers, for other real estate, which was conveyed to her.

The court below, after a trial without a jury, rendered judgment canceling the conveyances and transfers between the parties, and giving plaintiff a lien for the value of the leasehold property upon the said real estate so conveyed to Mrs. Rogers, and for the recovery from Griff of the value of the stock of goods.

H. H. Finley and Davis & O'Brien, for appellants. John B. & W. H. Sanborn, for respondent.

RIPLEY, C. J. The court below finds that the plaintiff bought the property in question, relying upon the representation of the

defendant that there was no other incumbrance thereof than the mortgage for $4,000. Although the defendant was then ignorant of the existence of the incumbrance thereon of the mortgage for $2,250, there is no doubt but that, under the circumstances, his representation must be treated as fraudulent,—as much so as if he had told a willful falsehood.

The court finds that said record incumbrance arose as follows: One Colter had sold the defendant the property in question, subject to said mortgage for $4,000, and for part of the purchase money, viz., said $2,250, defendant had agreed to give a mortgage on other land. Before its execution, however, Colter told defendant he should want other property put in the mortgage, and defendant told him he might put any other property in it, whereupon said Colter caused the property in question to be inserted therein, and the mortgage to be presented to defendant, who executed without reading it, and it was at once recorded.

Defendant's ignorance of the existence of such incumbrance was, therefore, the result of gross negligence; and, in the view of a court of equity, a false representation, founded on mistake resulting from such negligence, is a fraud. Smith v. Richards, 13 Pet. 26, 38.

It is said, however, that this second mortgage was, in point of fact, no incumbrance on the property in question, because neither the defendant nor any one else ever directed the conveyancer to insert the description of the property in question therein, and because the uncontradicted testimony of defendant and Colter goes to show that none of the parties intended to incumber the land in question.

It is not necessary to consider the question as to what the right of plaintiff in this case would have been had the property been so inserted by the scrivener's mistake, neither defendant nor Colter intending that he should do so; for the evidence, in our judgment, by no means answers the defendant's description of it. The uncontradicted testimony of Colter, for example, is that he "gave Hoffman (the scrivener) instruction to insert the description of the land sold plaintiff in the $2,250 mortgage."

The court below finds that plaintiff wholly relied upon these representations aforesaid of defendant in concluding said purchase, and would not have bought the property had he known of the existence of said incumbrance.

The defendant contends that as the records were open to plaintiff, and he had an opportunity to examine the title before purchasing, it was his duty to do so, and, not having done so, the rule caveat emptor applies.

If the defendant, instead of positively asserting that there was no other incumbrance on the property, had informed the plaintiff of the facts found by the court, it is beyond doubt that plaintiff would have refused to buy until he had searched the records and ascertained that the mortgage did not cover the farm he proposed to buy. But since the defendant chose to substitute his own positive, unqualified assertion that no such mortgage existed, it does not lie in his mouth to say that it was the plaintiff's own folly to believe him, instead of going to Stillwater to ascertain whether or not he was stating the truth. The purchaser confided in the statement of the defendant, upon the assumption that the owner knew his own property, and truly represented it, (Smith v. Richards, supra,) and nothing could be more legitimate than such an assumption, for there is certainly no presumption in favor of ignorance and dishonesty. Vide Campbell v. Whittingham, 5 J. J. Marsh. 96.

It is further objected, however, that to entitle the plaintiff to a rescission the tender made by him at the trial of a reconveyance should have been made before the commencement of the action, and kept good by a deposit of the deed with the court. Since, however, the plaintiff's right to rescind springs out of the defendant's fraud, no such tender was a condition precedent to his right to apply to a court of equity for the enforcement of that right. A bill to rescind a contract on the ground of fraud, it is held, may be maintained without a previous offer to restore what the plaintiff received. Martin v. Martin, 35 Ala. 560; Garner v. Leverett, 32 Ala. 410.

It is further objected that the deed tendered at the hearing was in itself defective and insufficient as the basis of a decree for the relief prayed. It is a quitclaim, with covenant against incumbrances arising by, from, or under him, and warranty against all lawful claims so arising. It is said that this, if accepted, would not leave defendant's title as it was prior to the conveyance from defendant to plaintiff. It is not stated, and we cannot see, why it would not.

The consideration stated in the deed is $500. This, it is said, is insufficient; but as this is not a sale and conveyance by plaintiff to defendant, but merely to revest the legal title in defendant of land in which, as he avoids the contract for fraud, the plaintiff claims no beneficial interest, a nominal consideration would have been enough.

It is also objected that the lands are therein described as in Ramsey county, whereas they are in Washington county. This is immaterial: the description of the land by metes and bounds locates it with such exactness that the error in the name of the county is patent in the face of the deed, and could not mislead. The deed, as copied in the paper book, does not appear to have been stamped. The court below, however, finds that it was duly stamped, and as the stamp is no part of the instrument, the fact

that what purports to be a copy of the deed does not show that the deed was stamped, does not tend to prove that the finding of the court is against the evidence.

As to these last two objections, however, it is also sufficient to say that they were not made at the trial.

The defendant's only objection to the tender, then, was that it came too late, and that the consideration was too small. The court below finds, however, that before the commencement of the action defendant offered to indemnify plaintiff against said incumbrance, and that plaintiff declined; and defendant also insists (though the court does not so find) that defendant also offered to procure a release of said incumbrance. Taking it to be proved that he did, then defendant contends that, as equity always considers that as done which ought to be done, it was the same to the plaintiff that the release was offered to be procured before suit brought, as if it had been handed to him at the time he bought the land, or as if the incumbrance had never existed at all.

On this theory we do not see the importance of any offer to produce a release before suit brought. If defendant ought to have made an offer to procure a release,—and equity always considers that as done which ought to be done,—there would seem to be as much reason for considering the offer as made, though it were not, as for considering the release as actually executed. The defendant's theory, it is moreover to be observed, requires this release to be considered as executed, in the face of the finding of the court below that though Colter at one time before the commencement of the suit promised defendant to release, yet that he afterwards refused to do so, and did not in fact execute any such release.

It is enough, however, with reference to this ground of defense, that it proceeds upon an entire misapplication of the maxim in question. Although, therefore, such release was actually produced at the trial, the case of Davidson v. Moss, 5 How. (Miss.) 685, relied on by the defendant, is not in point, for there a tender of the deed perfecting the title was pleaded in the answer.

The defendant, however, relies upon the reasoning by which the court in that case arrives at its conclusion, as sustaining his position that the court ought not to decree a rescission of this contract, the incumbrance being actually released before decree. In that case the complainant brought his bill for relief from payment in full of the purchase price of a plantation and negroes on the ground of a false warranty of soundness of some of the negroes, and for an injunction against a foreclosure of a deed of trust given to secure such purchase money. After answer the complainant filed an amended bill, which stated that after the filing of the original bill the complainant discovered that a large number of the slaves were the property of defendant's wife, and that the defendant fraudulently concealed the fact, and represented himself as the owner; that he would not have bought if he had been aware of it; that defendant had within a few weeks tendered deeds of himself and wife and children for the slaves, which he declined, considering himself as entitled to a rescission of the contract as to the 18 slaves on account of the fraud.

The court were of opinion that by analogy to the doctrine in cases of suits for specific performance, (in which, unless time is of the essence of the contract, it is sufficient that the vendor is able to make a title before decree,) the deed in the case before it was a fulfillment of the contract, and the covenant for title was fully kept by having a capacity to convey at any time before decree.

The doctrine in cases of specific performance, however, goes upon the ground that time is not of the essence of the contract; that is, that a title at any time before decree was what the parties in effect bargained for. But the agreement in the case of an executed contract is express that the seller has a good title at the time of the transfer or conveyance.

There is no room, therefore, for any supposition that time was not of the essence of the contract, and the court, in Davidson v. Moss, seem to have overlooked this in saying that, so far as the principle is concerned, it made no difference that the contract was executed. The court admit that if the purchaser had sustained any damage in consequence of the fraud, the tender pleaded would have been no answer to the bill; but say that there was no proof of any loss or damage by the complainant in consequence of the defect alleged, and cite Boyce v. Grundy, 3 Pet. 210, as holding that, in the absence of such proof, if the party is able to make title when the bill to rescind the contract is filed, and so answers, and duly sets out the title to be tendered, it may be a good answer to the bill. The case, however, does not come up to that. It was a bill filed to rescind an agreement between Boyce and the complainant for the sale by Boyce to him of a tract of land in Tennessee, in which, by the agreement itself, four years' time was allowed to make a title. It was not only the case of an executory agreement, but of one in which time would hardly have been held of the essence of the contract.

The language of the court upon the point is that, since upon discovery of the fraud the complainant gave notice, "not of an intention to rescind, but of a claim for a deduction pro rata, and since time is expressly given, to the extent of four years, to make title to the whole tract, we will not affirm that in the absence of any proof of positive loss from want of title in the interval, if the party had been able to make title when the bill was filed, and had so answered, and duly set

out the title to be tendered, that it would have been a case for relief."

The principle of that case, therefore, is in our opinion inapplicable to a bill brought to rescind a conveyance on the ground of fraud, and the conclusion of the court in Davidson v. Moss, that though there may have been a fraud practiced by the vendor at the time of the contract, the vendee has not sustained any injury, and therefore is not entitled to the relief he seeks, is equally inapplicable to the case before us.

It is true that a false representation in respect of an immaterial fact, as it can occasion no injury, is no ground for relief. But this was a false representation of a most material fact. In consequence, the plaintiff was induced to buy property incumbered in the sum of $2,250 more than he supposed it was. That is certainly an injury. If he had brought an action at law on the covenant against incumbrances, it would not be pretended that a tender at the trial of a release would entitle the defendant to a verdict. Yet that in effect is what is asked here. It is true that even in cases of fraud it is within the sound discretion of a court of equity, under the circumstances of the case, to refuse to rescind a contract, (2 Story, Eq. 694;) but we think the court below exercised a sound discretion in refusing the defendant leave to amend his answer and plead the tender in bar of this action.

If a contract ought not in conscience to bind one of the parties, as if he was imposed on by the other party, a court of equity will interpose by setting aside the contract. Hepburn v. Dunlop, 1 Wheat. 197.

"It has been further urged (it is said in Boyce v. Grundy, 3 Pet. 210) that the misrepresentation, if at all established, was not of a personal character, susceptible of compensation or indemnity, to be assessed by a jury. On this there may be made several remarks; and, first, that if the facts made out such a case, yet the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation, or absolution."

In the present case, however, as the release, if accepted when tendered, could in no sense be said practically to place the plaintiff in the same position as he would have occupied if the property had not been so incumbered when he bought it, it was no indemnity even in a pecuniary sense for the past.

It should seem that it hardly lay in the defendant's mouth to interpose any objection to the rescission of this contract. The plaintiff testifies, and the defendant does not deny, that in answer to the plaintiff's inquiry as to whether there were any other incumbrances on the farm than the $4,000 mortgage, the defendant said, "No; if there was it was no sale." Again, before the conveyance was executed he repeated that "if, when the abstract came, any other incumbrance appeared, it should be no sale." There is certainly no injustice in compelling the defendant to make his words good. Plaintiff, on rescission, was entitled to the property he parted with, or the proceeds, if to be traced. Hence there was no error in charging the property of Mrs. Rogers with so much of the proceeds of plaintiff's property sold by the defendant as had been used in the purchase of that property.

Order appealed from affirmed.

(See, also, 2 Pom. Eq. Jur. § 888, note; 1 Story, Eq. Jur. §§ 192, 193, note; Beebe v. Young, 14 Mich. 136; Brooks v. Hamilton, 15 Minn. 26, [Gil. 10;] Converse v. Blumrich, 14 Mich. 109; Miner v. Medbury, 6 Wis. 295; Webster v. Bailey, 31 Mich. 36; Smith v. Richards, 13 Pet. 26; Gammill v. Johnson, 47 Ark. 335, 1 S. W. Rep. 610; Rawlins v. Wickham, 3 De Gex & J. 304; Dowling v. Lawrence, (Wis.) 16 N. W. Rep. 552; Rorer Iron Co. v. Trout, [Va.] 2 S. E. Rep. 713.)

(If the thing, the consideration of which is sought to be recovered, be entirely worthless, there is no duty to return it. Babcock v. Case, 61 Pa. St. 427.)

(If one believes the false statement he makes to be true at the time he makes it, but afterwards ascertains its falsity, and yet allows the other party, relying on such false statement, to go on and act upon it, such statement from the time of the discovery becomes fraudulent, though it were not so originally. Reynell v. Sprye, 1 De Gex, M. & G. 660, 709.)

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## But where a party makes false representations of material facts, but which he believes to be true, and the other party has equal opportunity of ascertaining their truth or falsity, or has the means of informing himself by the use of reasonable diligence, such statements do not constitute a ground for equitable relief.

(1 N. W. Rep. 167, 46 Wis. 415.)

MAMLOCK v. FAIRBANKS.

Supreme Court of Wisconsin. March 25, 1879.

Appeal from circuit court, Milwaukee county.

Cotzhausen, Smith, Sylvester and Scheiber, for appellant. R. N. Austin, for respondent.

ORTON, J. This action is brought to set aside the contract by which the plaintiff, by her agent, one Marcus Silber, purchased of the defendant a certain note and mortgage executed by one John F. Randall to one Joel E. Ackerman, and to recover back the purchase money therefor, on the ground of false and fraudulent representations made by the

defendant to the agent Silber, at the time of the purchase, as to the adequacy of the mortgage security, and as to the responsibility, identity, and residence of the parties, which formed the inducement of the contract.

On the trial the agent Silber testified, that he did not rely upon the security of the mortgage, but upon the responsibility and credit of the parties; therefore, the material ground of the action was, the false statement by the defendant of the identity and residence of Randall and Ackerman. It appeared that the residence of both was stated in the formal parts of the mortgage, and a certificate of satisfaction accompanying the same, the former as being of the town of Lind, of the county of Waupaca, and the latter as being of the village of Waupun, Fond du Lac county, and that the mortgage was acknowledged by Randall and his wife, in Waupaca county. It appeared also, that at the time there was a man by the name of J. Randall residing in the county of Dodge, and a man by the name of J. Ackerman, a justice of the peace in said village of Waupun, both men of good credit and responsibility, and known to be so by the agent Silber; that he supposed they were the parties to said note and mortgage, and that when he asked the defendant if they were the parties to the note and mortgage, the defendant replied that they were; and it further appeared, that at the time of the purchase the agent Silber had the note and mortgage in his hand, and opened the mortgage; that there was nothing to prevent him from examining the papers; that he could read the English language; and that his brother examined the mortgage.

It was claimed at the trial for the defendant, that Silber had in his hands at the time, the papers which showed the residence of both Randall and Ackerman, and therefore knew, or might have known, the truth or falsity of the statement of the defendant as to such residence, and did not rely, or ought not to have relied upon, and was not misled, or ought not to have been misled, by such statement. It was admitted, that John F. Randall, the maker of the note and mortgage, was not said J. Randall, of the county of Dodge, and did not reside in that county, and the said Joel E. Ackerman was not a justice of the peace in the village of Waupun. There seems to have been some evidence given upon the question as to whether the agent Silber knew, or had the present means of knowing, the truth or falsity of the statement of the defendant complained of, and we think there was at least sufficient evidence on that point to have been submitted to and considered by the jury. The present means of knowledge concerning the subject-matter of the representations of the party complaining, and whether he knew, or might, or ought to have known the truth aside from such representations, are always material questions in such a case, and cannot be ignored where there is any proper evidence upon which they can be raised. This doctrine is elementary, and within the principle and reasons of caveat emptor. Broom's Maxims, 617, and the rule was well stated by this court in State v. Green, 7 Wis. 676, in respect to the crime of obtaining property by false pretences, as the true rule in all cases of fraud by false representations, that it is not to be extended to the protection of those who, "having the means in their own hands, neglect to protect themselves." The rule as to personal property generally, is equally applicable to the subject-matter of the representations in this case, "that if the defects in the subject-matter of sale are patent, or such as might or should be discerned by the exercise of ordinary vigilance, and the buyer has the opportunity of inspecting it, the law does not require the seller to aid and assist the observation of the purchaser." Kerr, Fraud & M. 101. "The law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them." "Vigilantibus non dormientibus jura subveniunt." This principle is so universally recognized by the authorities that it needs no further reference. But, at the same time, there is another and concomitant principle to be considered in all such cases, and that is, that the seller must not use any art, or practice any artifice to conceal defects, or make any representations, or do any act, to throw the purchaser off his guard, or to divert his eye, or to obscure his observation, or to prevent his use of any present means of information. Id., 98.

In this case there was no general verdict for the plaintiff, but the verdict consists of the answers of the jury to certain special questions of fact, none of which embrace this indispensable element or principle without which the findings are incomplete and insufficient to warrant the legal conclusion of the judgment. For these findings may all be correct, and yet the plaintiff not be entitled to recover, by reason of her having had the present means of knowing that the representations upon which she claims to have relied, were false. There was evidence on the trial, which not only warranted, but, we think, required, that this specific question should have been considered and answered by the jury. But the learned counsel of the appellant did ask the court to submit to the jury this question, in the following instructions, which were refused: "The plaintiff cannot, under the evidence, recover in this action, if by the exercise of diligence at the time and place of said representations, she might have discovered that they were incorrect." "The plaintiff cannot recover in this action, if the defendant believed that the

statements alleged to have been made, were true, and if the plaintiff had an equal opportunity of ascertaining their truth or falsity." These instructions contain a substantial expression of the rule above considered, and should have been given, and with them, the qualification, "unless prevented from the discovery of the truth, by the artifice of the defendant." Then the whole case would have been covered and disposed of by the verdict.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

(See, also, Pratt v. Philbrook, 33 Me. 17; Suessenguth v. Bingenheimer, 40 Wis. 370; Rockafellow v. Baker, 41 Pa. St. 319; Durkee v Durkee, [Vt.] 8 Atl. Rep. 490; Hathaway v. Noble, 55 N. H. 508; Watson v. Austin, 63 Miss. 469; Tindall v. Harkinson, 19 Ga. 448; Slaughter's Adm'r v. Erson, 13 Wall. 379; Hall v. Thompson, 1 Smedes & M. 443.)

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**Equity will not enforce the specific performance of a contract at the instance of one who has made false representations respecting a material fact to the other's injury, notwithstanding his statements were made in good faith; for whether he knew his statements to be true or false is wholly immaterial.**

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(39 Ohio St. 491.)

MULVEY v. KING.

Supreme Court of Ohio. Jan. Term, 1883.

Error to the district court of Portage county.

W. B. Thomas and Luther Day, for plaintiff in error. Ira S. King and Alphonso Hart, for defendant in error.

UPSON, J. The facts alleged in the amended answer not having been put in issue by a reply, and having also been fully proved by the testimony, the court of common pleas must have decided that these facts did not constitute a defense nor counter-claim. The representation that the tract of land purchased, included a piece more valuable than that actually conveyed, on account of its being of better quality, and having on it timber, and a building of some value, was certainly a material representation, and if made falsely or fraudulently, would, without doubt, constitute a good cause of action for the damages sustained by a person who was, by means thereof, induced to purchase the property.

In the case of Allen v. Shackelton, 15 Ohio St. 145, it was held that the purchaser might set up, as a defense to a suit upon the note and mortgage given for the purchase money, a counter-claim for damages for fraud practiced, in the sale of the premises by the vendor, by means of representations similar to those which were made by King to Mulvey; but that was a case of actual fraud.

In the case of Taylor v. Leith, 26 Ohio St. 428, which was an action brought to recover damages for fraudulent representations in the sale of lands, it was held that the instruction given by the court of common pleas was calculated to mislead the jury, by giving them to understand that the representations which were untrue in fact would give a cause of action, although they may have been founded in mere mistake; and, in the opinion of the court, White, J., says: "The present action is brought to recover damages for fraud or deceit practiced in the sale of land. To constitute a cause of action there must be bad faith. If the representations, when made, were believed to be true, and the facts of the case were such as to justify the belief, there is no fraud or deceit, and there can be no recovery."

In the case of Aetna Ins. Co. v. Reed, 33 Ohio St. 283, it was held that an action would lie for a false representation of a material fact, whether the party making it knew it to be false or not, if he had no reason to believe it to be true, and it was made with the intention of inducing the person to whom made to act upon it, and he did so, sustaining a damage in consequence. The principle upon which a person is held liable for damages in such a case is, that one who causes damage to another by inducing him to act upon representations false in fact, and which the person making them had no reason to believe to be true, is guilty of such gross negligence as in law is regarded as a fraud.

It may be considered as well settled in this state, by the cases above cited, that an action for damages caused by misrepresentation cannot ordinarily be maintained, without proof of actual fraud, or such gross negligence as amounts to fraud. When, however, a person claims the benefit of a contract into which he has induced another to enter by means of misrepresentations, however honestly made, the same principles cannot be applied. It is then only necessary to prove that the representation was material and substantial, affecting the identity, value or character of the subject-matter of the contract, that it was false, that the other party had a right to rely upon it, and that he was induced by it to make the contract, in order to entitle him to relief either by rescission of the contract or by recoupment in a suit brought to enforce it.

In this case it is fully proved that the

representations made, materially affected the identity and value of the property sold, that they were made for the purpose of inducing Mulvey to make the purchase, that he believed them to be true and therefore bought the property, which he would not otherwise have done, and that they were false. But the testimony also fully proves that King was guilty neither of fraud nor of gross negligence in making those representations, his mistake having been occasioned by that of a surveyor in previously establishing the boundary line.

The facts thus proved bring the case within the principles above stated and give a right of recoupment in an action for the balance of the purchase money, to the extent of the deficiency in the value of the property purchased. The rights of the purchaser do not rest upon the ground of fraud, actual or constructive, but that, to the extent of the difference in value between the property as it was represented to be, and the property conveyed, there is no consideration for his promise. He cannot, upon any principle of law or equity, be compelled to pay for what the vendor did not own, and could not convey. The maxim caveat emptor does not apply to such representations as were made in this case, upon which the purchaser under the circumstances had a right to rely, and in reference to which he was guilty of no negligence.

Judgments of the district court and court of common pleas reversed, and cause remanded.

(77 Pa. St. 50.)

HOLMES'S APPEAL.

Supreme Court of Pennsylvania. Oct. 26, 1874.

Before AGNEW, C. J., and SHARSWOOD and MERCUR, JJ.

Bayne & Magee, for appellant. T. C. Lazear, for appellee.

PER CURIAM. When the treaty between the parties for the exchange was in progress, both Heckler and his wife were anxious to know whether ague and fever existed in the vicinity of the Indiana farm, and inquired of Holmes as to the fact. He represented that none existed, and that the health of that locality was good in this respect.

The facts show clearly that this was a misrepresentation on his part. It is evident Heckler and his wife made the absence of that disease a material ground for accepting the offer of Holmes. Now clearly, equity, under such circumstances, will not compel a man thus misled to perform specifically a contract of exchange at the risk of his health and that of his family. Even had there been no misrepresentation on Holmes's part, it would be doubtful whether a chancellor would compel specific performance against one who was ignorant of the fact; but when this conduct of the plaintiff is added, there can be no hesitation. The other question does not necessarily arise under this view of the case. Decree affirmed with costs, to be paid by the appellant, and the appeal dismissed.

(See, also, 2 Pom. Eq. Jur. § 889; Pom. Spec. Perf. Cont. §§ 217, 218; Fry, Spec. Perf. § 454; Veth v. Gierth, 92 Mo. 97, 4 S. W. Rep. 432; Dunn v. White, 63 Mo. 182; Isaacs v. Skrainka, (Mo. Sup.) 8 S. W. Rep. 427.)

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## (*b*) FRAUDULENT CONCEALMENT.

**If a party conceals some material fact in a transaction which it is his duty to disclose, such concealment amounts to actual fraud, and furnishes ground for equitable relief.**

(14 Atl. Rep. 574.)

COLLINS v. COOLEY et al.

Court of Chancery of New Jersey. June 16, 1888.

Bill to foreclose a chattel mortgage.

Carroll Robbins, for complainant, Elizabeth Collins. James Buchanan, for defendant Wentz. G. D. W. Vroom, for defendants Lockwood & Co. Edwin R. Walker, for defendants Harbison & Co.

BIRD, V. C. This is a contest between certain chattel mortgagees and the vendor of a portion of the goods mortgaged. The defendants Harbison & Co. allege that Cooley, the mortgagor, obtained the goods involved, of them, by fraud, and that, as against the mortgagees, who hold the goods under mortgages given to secure moneys which had been previously loaned, they (Harbison & Co.) can hold them under their replevin. Was any fraud perpetrated by Cooley at the time of the sale? This is the only question. Cooley had been in business in Brooklyn, and was about going to Hagerstown, Md., when he called on Harbison & Co. for additional credit, (having dealt with them for years on credit.) He selected about $1,300 of goods, and then Harbison called his attention to their long-continued friendship and business intercourse, and also to the fact that his efforts in Brooklyn had not been a success, and said: "Now, I would like to know how you stand?" Whether, in his reply to this inquiry, Cooley said that he would take $13,000 or $14,000 worth of

goods to Maryland, as he insists, or $18,000, as Harbison says, is not so material as another point raised by the inquiry. Cooley said his indebtedness was $4,000 to $5,000; but he says that, whatever the amount of the indebtedness which he named was, it did not include his individual indebtedness, but only his indebtedness on merchandise account. He makes a distinction. Now, at this very time, he was indebted to the chattel mortgagees, although they did not take their mortgages till long after, in the sum of $9,000 and over, for money borrowed. This money he had put in his business as a merchant, and had given the lender credit for it on his books. He says he did not include the amount of this indebtedness in his statement to Harbison because the latter did not ask for it; and it is urged that he was not bound to disclose this fact. Surely, the complainant's counsel must be wrong in this. If one business man, a vendor, asks his vendee for a statement of his financial condition, or asks him how he stands, it cannot possibly be that he answers fairly and fully if he only speaks with reference to the business he proposes to promote by the particular purchase. This case shows that, if such partial statements were to be regarded as sufficient, most extraordinary wrongs would be inflicted on honest business men. I think Harbison was entitled to full disclosure of the situation, and that the concealment, by Cooley, of his indebtedness for money borrowed, was a fraud. It was his duty to tell the whole truth. See Bigelow, Fraud, 503, 504. The following cases aid in reaching a just conclusion: Stoutenburgh v. Konkle, 15 N. J. Eq. 33; Hicks v. Campbell, 19 N. J. Eq. 183; Ensign v. Hoffield, (Pa. Sup.) 4 Atl. Rep. 189; Robinson v. Levi, 81 Ala. 134, 1 South. Rep. 534; Doane v. Lockwood, 115 Ill. 490, 4 N. E. Rep. 500; Atwood v. Dearborn, 1 Allen, 483. The cases in which the right of the vendor to recover the goods because of fraud have been considered, together with the right to pursue them when the vendee has parted with them wholly or partially, all hold that he is entitled to them as against every one who is not a bona fide purchaser for value. See the cases above cited.

I find the value of the goods sold by the receiver, which had been replevied by Harbison & Co., is $499.79. This amount the receiver should pay to Harbison & Co., and also their costs, out of the funds in his hands. I will so advise.

CASES IN LAW.

(Insolvency. Fitzsimmons v. Joslin, 21 Vt. 130, note; Lee v. Simmons, [Wis.] 27 N. W. Rep. 174, note; Oswego Starch Factory v. Lendrum, [Iowa,] 10 N. W. Rep. 900; Donaldson v. Farwell, 93 U. S. 631.)

(Insurance. Burritt v. Saratoga, etc., Ins. Co., 5 Hill, 189; New York Bowery Ins. Co. v. N. Y. Fire Ins. Co., 17 Wend. 359; Baker v. Humphrey, 101 U. S. 502; 1 May, Ins. § 102, note.)

(Sale of chattels. Paddock v. Strobridge, 29 Vt. 471, note.)

(Silence. Parrish v. Thurston, 87 Ind. 437.)

(As to what one is bound to disclose. Bench v. Sheldon, 14 Barb. 66.)

(See, also, 2 Pom. Eq. Jur. § 900; 1 Story, Eq. Jur. § 207; Stoutenbourgh v. Konkle, 15 N. J. Eq. 33; Durell v. Haley, 1 Paige, 492.)

## II. CONSTRUCTIVE FRAUD.

**Corrupt conduct is not an essential element in constructive fraud. Equity declares it to exist in numerous transactions, such as contracts in restraint of trade, in restraint of marriage, and many others as against public policy, and also transactions between persons standing in confidential or fiduciary relations.**

(79 Ill. 346.)

CRAFT et al. v. McCONOUGHY.

Supreme Court of Illinois. Sept. Term, 1875.

M. D. Hathaway, William Barge, and Sherwood Dixon, for plaintiffs in error. James K. Edsall, for defendant in error.

CRAIG, J. This was a bill in equity, brought by James O. McConoughy against Richard C. Craft and others, for an account and distribution of the profits of an alleged partnership claimed to have existed under a written contract, to the following effect:

"Articles of agreement made and entered into this 20th day of April, A. D. 1869, between the following persons, viz.: E. P. Sexton, Dr. John McConoughy, C. B. Boyce, R. C. Craft and William Wiswell, for the purpose of systematically pursuing the grain trade in Rochelle, and for mutual protection against losses. The said parties covenant and agree to enter into the grain trade for one year from this date, upon the following

terms: Our several grain houses shall be put into the business upon the basis of twenty-seven shares as the aggregate, divided as follows: C. B. Boyce and R. C. Craft shall be entitled to nine shares, E. P. Sexton to six shares, J. McConoughy to six shares, and William Wiswell to six shares. Each separate firm shall conduct their own houses as heretofore, as though there was no partnership in appearance, keep their own accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with; a list of all the grain purchased by each firm to be made every day and handed to the general bookkeeper, with amounts paid for the same; also every car shipped to be reported at the time, and every account of sale to be handed in to said bookkeeper, as well as all sales made at the warehouse from time to time. It shall be the duty of the bookkeeper to make a faithful record of all the grain bought by each party, the amount of money paid for the same, and place to his debit, and also to credit him with all account of sales, as well as any transactions made at the warehouse, and, at the end of every month, each individual's account to be balanced, showing the profits or loss, which amount is to be divided pro rata, according to the number of shares held by each party. It is further agreed, that there shall be no grain held for advance in price, or for any other cause, by any of the above named parties.

"Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and a half cents per bushel, monthly; but if sold inside of thirty days, no storage to be asked. No grain to be shipped by any party at less than two cents per bushel."

In November following the execution of the agreement, John McConoughy died, and it is the theory of the bill that the complainant, who was his son, by mutual consent came in and took his place under the contract.

It is set up in the answer, that the contract was made in restraint of trade, and is against public policy, and void; that all transactions with complainant or with his father and defendants, under or in pursuance of it, and under the alleged arrangement with complainant after the death of his father, were in restraint of trade, against public policy, and void.

Two questions arise upon the record: First, whether the contract set out in the bill is void. Second, if illegal and void, will a court of equity, after it has been executed, require one of the parties to account to another for a portion of the gains arising under the contract?

Prior to and up to the time of the execution of the agreement set out in the bill, the four parties were engaged in the grain business in the town of Rochelle, each one on his own account, and in competition with each other, but, after the agreement was executed, all competition ceased. All the warehouses in the city, and every lot suitable to erect a warehouse upon, were controlled by the combination. Some were purchased and others leased, so that the combination formed effectually excluded all opposition in the purchase, sale, storage and shipment of grain in that market.

Secret meetings were held in the nighttime by the parties to the contract, at which the price to be paid for grain was agreed upon, rates for storage and shipment fixed, in order that the public should be kept in ignorance of the plans and operations of this illegal combination.

To the public the four houses were held out as competing firms for business. Secretly they had conspired together, and were working in a common cause, in the sole interest of each other.

The language used in the contract itself leaves no room for doubt as to the purpose for which the agreement was entered into, as a few extracts will show: "Each separate firm shall conduct their own business as heretofore, as though there was no partnership in appearance, keep their accounts, pay their own expenses, ship their own grain, and furnish their own funds to do business with." * * * "Prices and grades to be fixed from time to time, as convenient, and each one to abide by them. All grain taken in store shall be charged one and one-half cents per bushel, monthly." * * * "No grain to be shipped by any party at less rates than two cents per bushel."

While the agreement, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was, to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country.

That the effect of this contract was to restrain the trade and commerce of the country, is a proposition that can not be successfully denied.

We understand it to be a well settled rule of law, that an agreement in general restraint of trade, is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable.

This subject was ably discussed in the

leading case of Mitchel v. Reynolds, 1 P. Wms. 181; see, also, 1 Smith's Lead. Cas. 772, and notes, and the rule of law established, which has been followed and adhered to in numerous cases since.

In reference to the point, what might be regarded a reasonable restriction, numerous cases might be cited, but what was said in Horner v. Graves, 7 Bing. 743, will illustrate the principle. Tindal, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either. It can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interest of the public, is void, on the ground of public policy."

If, therefore, the restraint imposed by the contract in question was but partial, as insisted upon by the complainant, as it was unreasonable, oppressive and injurious to the public, it can not be sanctioned in a court of equity.

While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

It is, however, insisted that, even if the contract was contrary to public policy, as it has been executed, a court of equity will require an account.

The rule is, however, well settled in this state, that a court of equity will not lend its aid in the division of the profits of an illegal transaction between associates. Neustadt v. Hall, 58 Ill. 172; Skeels v. Phillips, 54 Ill. 309; Jerome v. Bigelow, 66 Ill. 452.

The complainant and the defendants were equally involved in the unlawful combination. A court of equity will assist neither.

The decree will be reversed and the cause remanded.

Decree reversed.

(In restraint of trade. Berlin Machine Works v. Perry, [Wis.] 38 N. W. Rep. 82.)
(Marriage brokerage. Duval v. Wellman, [Com. Pl. N. Y.] 1 N. Y. Supp. 70.)
(Corruption of public officers. Bartle v. Nutt, 4 Pet. 184; Robinson v. Patterson, [Mich.] 39 N. W. Rep. 21; State v. Cross, [Kan.] 17 Pac. Rep. 190.)
(Lobbying. Trist v. Child, 21 Wall. 441.)
(Gambling contracts. Paine v. France, 25 Md. 163; Chapin v. Dake, 57 Ill. 295.)
(The presumption of law is against the validity of contracts between parties standing in confidential, fiduciary, and kindred relations; as, attorney and client, principal and agent, trustees and cestuis que trust, guardian and ward, and others,—so that the duty of proving the contract to be fair and honest rests upon the party in the superior position. Bigelow, Eq. p. 135.)
(Attorney and client. Post v. Mason, 91 N. Y. 539.)
(Parent and child—Guardian and ward. Ashton v. Thompson, 32 Minn. 25, 18 N. W. Rep. 918.)

*

# APPENDIX.

(41 Barb. 285.)

NEWTON et al. v. McLEAN et al.

Supreme Court of New York. Sept. 7, 1863.

On the 24th of June, 1844, Donald McLean conveyed certain lands to Hector McLean, with an understanding at the time that Hector should manage the land for the use and benefit of the grantor, though Donald was to remain in possession. Hector afterwards mortgaged the premises to one Chappell, the plaintiff's testator. This suit is brought to foreclose the mortgage.

Before SMITH, JOHNSON, and WELLS, JJ.

Scott Lord, for appellant. M. S. Newton, for respondent.

E. DARWIN SMITH, J. Upon the facts found by the referee, I do not see why the conclusions of law based thereupon were not entirely legitimate and sound. The plaintiff made out a clear case upon his evidence, and the referee finds as matter of fact that the matters set up in the defendant's answer were not established. It follows that as no defense was made out the plaintiff was entitled to judgment for the foreclosure of the mortgage set out in his complaint. It therefore becomes necessary to inquire whether the exceptions to the exclusion of evidence offered by the defendants were any of them well taken. The first exception relates to the evidence offered to prove that the defendant Donald McLean was an illiterate person, and had been afraid of being cheated by people, and that at the time of the execution of the deed from him to Hector McLean there was a verbal agreement that the latter should take a deed of the premises, and manage them for Donald's use and benefit, and he, Donald, should remain in possession in the mean time; that the deed to Hector was executed in pursuance of such agreement; and that Donald had remained in possession ever since the execution of such deed. This evidence was objected to, and excluded by the referee. The whole offer, taken together, tended to establish that the defendant Donald McLean was the equitable owner of the premises in question, and that Hector took and held them in trust for his benefit. This offer was doubtless excluded upon the ground that it did not go far enough to displace the plaintiff's equity as a bona fide purchaser of the premises. Hector was invested with the legal title by the deed to him of the defendant Donald, given in evidence, of the date of June 21, 1844. And, being thus apparently upon the face of the record invested with such legal title, he conveyed the same to the plaintiff's testator, for a valuable consideration. To overreach the mortgage to Chappell, which vested him with a legal estate in the premises, the defendant was bound to go further than simply to show his prior equity. He was bound to show that Chappell had notice of such prior equity, before he advanced the consideration for the mortgage; that is to say, before he indorsed the notes of Hector which the said mortgage was given to secure. The rule in equity is that as between two parties having equal equities the prior equity must prevail; but if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail. So far as the defendant's offer went, it did not propose to show that Chappel had any notice of the prior equity of the defendant Donald McLean when he took his mortgage and incurred the liability it was given to secure. The exception must be considered as though the evidence had been received, and such evidence must in this sense be considered in connection with the other evidence in the cause. And if in connection with such evidence it would have made out a defense under the pleadings, it ought to have been received. It appears from the case that evidence was given and received tending to establish the fact that Chappell had notice of this prior equity, and such evidence was controverted, and the issue thus made on the evidence is found by the referee against the defendant. In this view the evidence tending to show the prior equity, thus excluded, would have been of no benefit to the defendant and would not have established a defense. To charge Chappell with notice of the prior equity it was necessary for the defendant to show that he had notice of such prior equity. The argument that he had constructive notice of such equity in the fact that Donald McLean was in possession of the premises fails, for the reason that it is not proved that Chappell knew such fact. In Grimstone v. Carter, (3 Paige, 437,) it is held that if the party claiming the prior equity is in possession of the estate, and the subsequent purchaser has notice of that fact, it is sufficient to put him upon inquiry as to the actual rights of such possession, and is good constructive notice of such rights. This

is sound law and the settled rule in equity in such cases. The offer of the defendant did not propose such proof, and the referee, having admitted evidence tending to establish such fact, has found that it was not proved. It seems therefore that the defendant was not injured by the exclusion of this evidence; for the proof given assumed the very fact offered to be proved,—that Donald McLean had the prior equitable title to the premises in question, and the referee has found for the plaintiff on that issue. This exception, I think, therefore, is not well taken.

The next exception is to the exclusion of the proof tending to show that the defendant Donald McLean was in possession claiming to hold adversely, and it is claimed that the plaiutiffs' mortgage was therefore void under the statute avoiding deeds where the grantor is not in possession, and has not been, for one year preceding the making of such deed. (1 R. S. 739, § 148.) This exception is not well taken. Donald could not claim to hold adversely under his own trustee. His occupation was like that of a tenant at will. It was not under claim of title adverse to that of his trustee whose title was derived from him. He could not claim adversely to his own title, or the title of Hector derived from him, and under which he had remained and held possession. The possession which avoids a deed for champerty must be under claim of a title adverse to that of the grantor in the deed sought to be avoided. (Crary v. Goodman, 22 N. Y. Rep. 170. Holdridge v. Stiles, decided by court of appeals, Dec. term, 1862, and not yet reported.) Donald McLean could not make any such claim, and the evidence was therefore properly excluded. The evidence of the title papers, claimed to have been destroyed by fire, was properly excluded. It was immaterial in fact, and it was a matter in the discretion of the referee whether he would or would not open the case to receive it. I cannot see that the evidence, if received, would in any degree have varied the case. It was simply additional evidence to establish a prior equity in Donald McLean, which was virtually assumed in the disposition made of the case by the referee as I have stated.

The motion for a new trial, on the ground of newly discovered evidence, should be denied. The evidence offered would be cumulative merely, on the single issue of the prior equity of the defendant Donald McLean. The case presents no basis, that I can see, for a claim that the prior equity of Donald McLean should prevail over the equity of the plaintiffs. Donald McLean conveyed his property to his son for his own use and benefit, and thus enabled him to commit what would be a great fraud upon the plaintiff's testator, if the claim arising upon his equitable title were to prevail over the legal estate acquired by Chappell under the mortgage. A party who enables another to commit a fraud ought rather to suffer the consequences of such fraud than to subject an innocent person, acting in good faith and relying upon the evidences of title given by such original owner of the estate, to suffer injury from such fraud.

I think the judgment should be affirmed, with costs.

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